IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division

IN RE: GARLOCK SEALING TECHNOLOGIES LLC, et al., Debtors.[1]	Case No. 10-BK-31607 Chapter 11 Jointly Administered

DEBTORS' POST-TRIAL BRIEF AND SUMMARY OF EVIDENCE PRESENTED AT TRIAL

[1] The debtors in these jointly administered cases are Garlock Sealing Technologies LLC; Garrison Litigation Management Group, Ltd.; and The Anchor Packing Company (hereinafter "Garlock" or "Debtors").

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Introduction

The evidence at trial demonstrates that Garlock made safe products that could not during normal use release asbestos in quantities sufficient to cause mesothelioma. Garlock's asbestos-containing products were used in environments in which workers were exposed to amphibole asbestos insulation, products that were banned by the federal government for their propensity to release massive amounts of airborne fibers that did cause mesothelioma and other asbestos diseases. When courts and juries have had the opportunity—as this Court had—to evaluate all the relevant evidence about plaintiffs' exposures to asbestos, they have overwhelmingly agreed that Garlock's gaskets and packing did not contribute to plaintiffs' diseases. Garlock won 92% of cases that went to verdict in the 1990s, when plaintiffs more freely admitted their exposures to friable asbestos insulation products. In the few cases Garlock lost, juries allocated Garlock small shares of fault. After 2005, Garlock won 13 out of 15 mesothelioma cases that went to verdict. It was assigned a two percent share in the fourteenth case and the fifteenth case is on appeal.[2] And in an opinion in 2011, the Sixth Circuit Court of Appeals held that a case in which a longtime pipefitter testified to extensive contact with Garlock gaskets should not even have been submitted to the jury because saying that Garlock gasket exposure "was a substantial cause of his mesothelioma would be akin to saying that one who pours a bucket of water into the ocean has substantially contributed to the ocean's volume." *Moeller v. Garlock Sealing Techs., LLC*, 660 F.3d 950, 954-55 (6th Cir. 2011).

Garlock's problem before its bankruptcy petition was not a liability problem, but a defense cost problem. It cost Garlock many times more dollars to try than settle a case. As a

[2] The fifteenth case is *Torres*, a case in which pre-trial estimation discovery produced evidence that the plaintiff filed undisclosed trust claims based on exposures to amphibole asbestos insulation and raw asbestos fibers produced by other, bankrupt companies. The plaintiff concealed that evidence in the case against Garlock.

result, prior to 2000, Garlock paid huge numbers of settlements to avoid even greater costs of defense. After 2000, when the companies that caused mesothelioma plaintiffs' diseases began filing for bankruptcy (the "Bankruptcy Wave"), this problem became more acute as Garlock's already high defense costs multiplied. The departure of Garlock's co-defendants led to a dramatic decrease in plaintiffs' identification of exposure to their dangerous products, which they had more freely admitted before. This increased Garlock's cost of defense, as it had to pay for investigation and experts to replace what plaintiffs previously admitted, which in turn increased the settlements that plaintiffs could demand. In a relatively small number of cases, it increased Garlock's trial risk, because juries did not receive the full picture of the plaintiff's exposures.

The problem should have been ameliorated when Garlock's former co-defendants reorganized and funded Trusts with tens of billions of dollars to pay mesothelioma claimants. Claimants had to allege exposure to the products of the debtors that funded the Trusts in order to collect that money. In cases against Garlock, there should no longer have been any dispute that plaintiffs were exposed to the Trusts' dangerous products. The return of evidence of exposure to the former defendants' products should have helped resolve Garlock's defense cost problem.

But instead, plaintiffs continued to deny or fail to admit their exposures to dangerous products, even while they were collecting billions of dollars from Trusts. Plaintiffs and their law firms continued to deny knowledge of the exposures, and took steps to prevent Garlock from discovering them, including by delaying Trust claims and taking advantage of confidentiality provisions placed in Trust Distribution Procedures ("TDP") to mask the claims. For whatever reason—whether intentional deception or strategic behavior—Garlock did not have access to this

evidence, and continued to face prohibitively high defense costs to replace it, as well as artificially high trial risk.

The ability of plaintiffs' lawyers to leverage control over access to evidence of their clients' asbestos exposures in order to obtain higher settlements is not a proper basis for measuring Garlock's liability in this bankruptcy case. The Court on April 13, 2012 ordered a trial for the purpose of "estimat[ing] Garlock's mesothelioma asbestos liability for allowance purposes pursuant to section 502(c)." Order for Estimation of Mesothelioma Claims (Docket No. 2102) (the "Estimation Order") ¶ 9. The Court "propose[d] to estimate the aggregate amount necessary to satisfy present and future claims that may be allowed at some later point in the case." *Id.* ¶ 11.

These allowance proceedings would be necessary absent a consensual resolution of this case because, unlike the debtors in cases in which the so-called "standard methodology" was used, Debtors dispute liability for all current and future mesothelioma claims asserted against them. As a result, Debtors are entitled to object to claims and have their objections adjudicated before any claim can be allowed for voting, distribution, confirmation, or any other purpose.[3]

[3] *See* 11 U.S.C. § 502(a), Fed. R. Bankr. P. 3002(a), 3003(c)(2) (claimants must file proofs of claim before claims can be allowed); 11 U.S.C. § 1126(a), *Jacksonville Airport, Inc. v. Michkeldel, Inc*, 434 F.3d 729, 731 (4th Cir. 2006) (only allowed claims may vote); 11 U.S.C. § 502(b) (if claim objected to, Court must "determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition"). Moreover, these allowance proceedings would have to be consistent with Debtors' rights to due process. *See, e.g., Cimino v. Raymark Industries, Inc.*, 151 F.3d 297, 312-321 (5th Cir. 1998) (holding that extrapolation of bellwether asbestos cases to larger population deprived defendant of right to individual determinations of causation and damages and thus violated state substantive law); *In re Fibreboard Corp.*, 893 F.2d 706, 710-12 (5th Cir. 1990) (same, and finding due process violation); *In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1022-23 (5th Cir. 1997) (Jones, J., concurring) (doubting that bellwether trials can constitutionally be used to resolve disputed issues of causation; "Essential to due process for litigants, including both the plaintiffs and Chevron in this non-class action context, is their right to the opportunity for an individual assessment of liability and damages in each case.").

Debtors requested a bar date and proofs of claim soon after these cases were filed in 2010. Debtors' Motion for (A) Establishment of Asbestos Claims Bar Date, (B) Approval of Asbestos Proof of Claim Form, (C) Approval of Form and Manner of Notice, (D) Estimation of Asbestos Claims, and (E) Approval of Initial Case Management Schedule (Docket No. 461). The Court denied Debtors' motion without prejudice, and several renewed motions, instead entering the Estimation Order. *See, e.g.*, Order on Motion of the Official Committee of Asbestos Personal Injury Claimants for Entry of a Scheduling Order and Debtors' Motion for Establishment of Asbestos Claims Bar Date, Etc. (Docket No. 853). Debtors reserve their rights.

The goal of this estimation proceeding therefore must be to forecast what would happen if those allowance proceedings took place. As the *Dow Corning* court recognized in the context of a mass tort bankruptcy case, "While estimation may be a somewhat abbreviated form of liquidation, **they are still generally duplicative processes**." *In re Dow Corning Corp.*, 211 B.R. 545, 566 (Bankr. E.D. Mich. 1997) (emphasis added). All relevant cases are in accord with this statement.[4] The purpose of this estimation proceeding is not to perpetuate abuse that impacted Garlock's settlements prior to the Debtors' bankruptcy cases but, like all litigation, to obtain the truth.[5] In any allowance proceedings supervised by this Court, the fact finder would have access to information about *all* exposures claimants know about, not simply those they would have had an interest in disclosing if Garlock had remained in the tort system.

Only an estimate of the amount of allowed claims, in fair proceedings where all evidence is on the table, will forecast to the parties what would likely happen if claims were subjected to statutorily required allowance proceedings. Such an estimate will permit the Debtors, claimants, and the FCR to negotiate and confirm a plan of reorganization that determines *how* the claims will be allowed—"through Garlock's Plan or that anticipated by the ACC and FCR . . . through litigation, settlement or a 524(g) Trust . . . [or through] some as yet unanticipated process." Estimation Order ¶ 10. Ideally, the parties could agree on the means for allowing claims that would save transaction costs for everyone involved and obviate the need to actually undertake such allowance proceedings. As the Fourth Circuit held in *A.H. Robins*,

> If the bankruptcy court could arrive at a fair estimation of the value of all the claims and submit a fair plan of reorganization based on such estimation, with

[4] *See, e.g.*, *id.* at 560 n.13; *In re Farley, Inc.*, 146 B.R. 748, 753 (Bankr. N.D. Ill. 1992); *In re Ralph Lauren Womenswear*, 197 B.R. 771, 775 (Bankr. S.D.N.Y. 1996) (holding that "[t]he estimated value of a claim is . . . the amount of the claim diminished by [the] probability that it may be sustainable only in part or not at all").
[5] *See In re Liotti*, 667 F.3d 419, 429 (4th Cir. 2011), *quoting United States v. Shaffer Equip. Co.*, 11 F.3d 450, 457 (4th Cir. 1993) ("Our adversary system for the resolution of disputes rests on the unshakable foundation that truth is the object of the system's process which is designed for the purpose of dispensing justice . . . .")

> some mechanism for dispute resolution and acceptable to all interested parties, great benefit to all the claimants could be achieved and the excessive expense of innumerable trials, stretching over an interminable time, could be avoided.

A.H. Robins Co. v. Piccinin, 788 F.2d 994, 1012 (4th Cir. 1986).

Debtors provided the Court with the only estimate of what claimants would expect to recover through allowance. Dr. Bates provided this estimate under extremely claimant-favorable assumptions, including the assumption that they would have the opportunity to proceed to trial (contrary to the ruling in the *Moeller* case), and that their causation evidence would not be excluded under *Daubert* or similar rules. He found that, on average, claimants would allege exposure to the products of 36 companies and Trusts (including Garlock), and would expect to succeed in their cases against Garlock less than 8% of the time. Thus, they would expect to recover no more than $125 million. These assumptions were reasonable (given Garlock's history, the nature of its product, and claimants' ability to recover from numerous other defendants whose products were ubiquitous and proven causes of disease) and were well-supported with standard econometric and statistical techniques.

As described below, this estimate was not seriously rebutted. Instead, the Committee and FCR's experts presented projections of what Garlock would have paid to settle claims, had it remained in the tort system, performing an extrapolation of what Garlock paid to settle claims in the years immediately before the petition. These experts measured the wrong thing. The discipline of Law and Economics long ago established that parties' settlements of disputed claims are not proxies for their expectations regarding outcomes of trials to determine liability. Even were it proper to estimate settlements, however, their projections have many flaws, discussed in detail below. Most important, they would perpetuate all the unfairness and abuse that Debtors proved occurred in the tort system before the petition. They do not attempt to

predict what would happen in fair proceedings, such as those that would occur if claims were allowed in this case.

Debtors' post-trial submission consists of this brief, an Appendix containing summaries of what Debtors proved during the examination of each witness at the trial (as the Court requested on the last day of trial), and proposed findings of fact and conclusions of law.[6] This brief marshals key evidence on an issue-by-issue basis. Part One briefly summarizes evidence presented at trial pertaining to Garlock's scientific defenses and litigation history. Part Two summarizes evidence proving that Garlock's settlements are not a measure of what would happen if mesothelioma claims were allowed. Part Three describes the evidence supporting the Debtors' estimate of allowed mesothelioma claims. Part Four demonstrates why a decision on the cost of resolving claims is premature, as the means for allowing the claims have not been decided, but that the evidence proves that any projection of costs should not exceed the funding under Debtors' plan ($270 million). Part Five shows that the projections presented by the Committee and FCR's experts (Dr. Rabinovitz and Dr. Peterson) are neither admissible nor credible. Finally, the Appendix summarizes what Debtors proved through each witness at trial, on a witness by witness basis.[7]

For all these reasons, the Court should enter an estimate no more than $125 million.

[6] Tr. 4867:11-17. In this brief and associated documents, "Tr." indicates the transcripts of the estimation proceeding.
[7] The Appendix does not contain summaries for Drs. Bates, Rabinovitz, and Peterson, whose testimony is summarized in full detail in this brief.

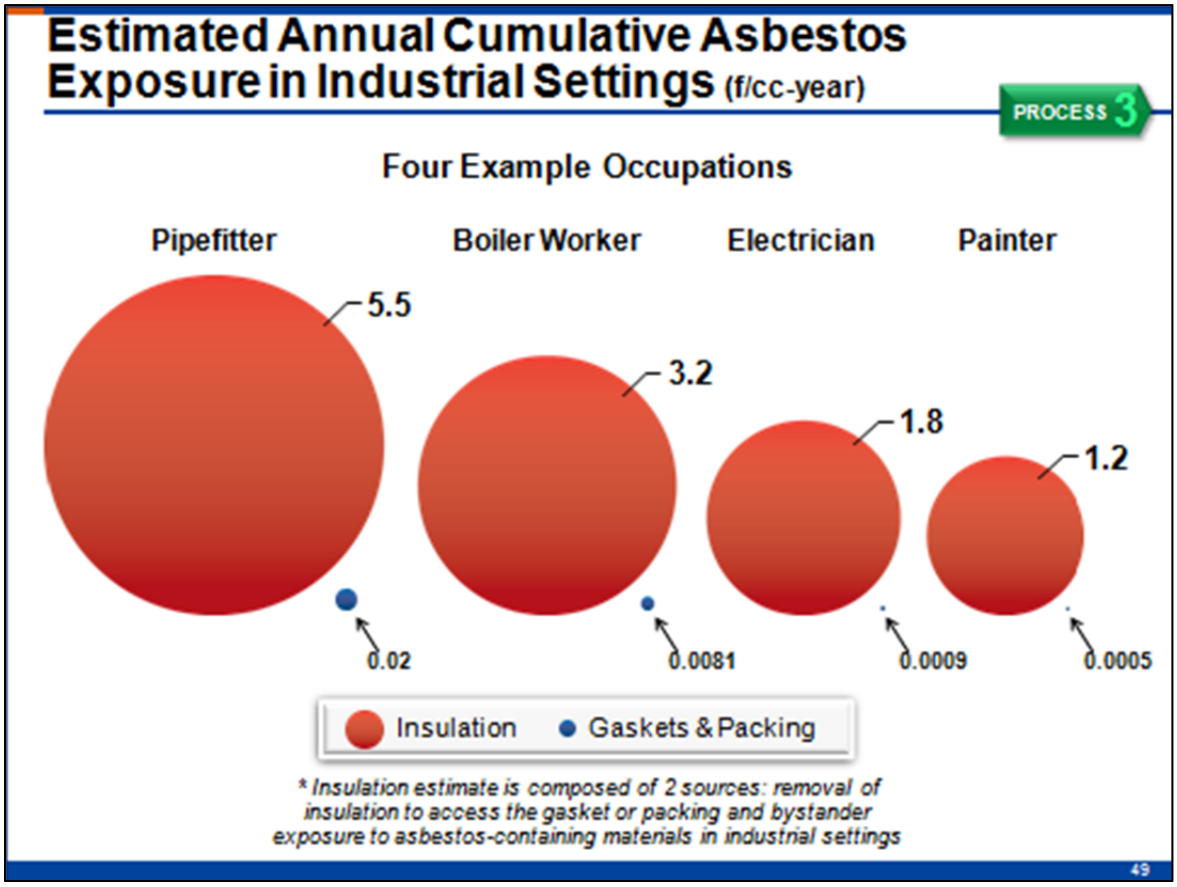
I. Garlock made a safe product that could be successfully defended so long as courts and juries had access to evidence about the true cause of plaintiffs' mesotheliomas

A. Debtors' medical and industrial hygiene evidence showed that Garlock's products did not cause plaintiffs' mesotheliomas

At trial, Garlock demonstrated its extraordinarily strong defenses to mesothelioma claims. In testimony that was not seriously disputed,[8] former OSHA Administrator John Henshaw explained his analysis, based on the actual information received from Garlock's current claimants through the personal injury questionnaire process, that asbestos exposure from insulation products (for which Garlock was not responsible) would dwarf exposure from Garlock gaskets and packing for virtually all likely claimants, as demonstrated in the following slide.[9]

[8] Significantly, no expert for the Committee even attempted to review data that would permit him or her to opine on comparative exposure of likely claimants. Rather, they focused only on episodic exposures, omitting both the frequency and duration prong of a scientifically reliable causation analysis, as Dr. Anderson explained. Tr. 4390:19-4391:1, 4397:24-4398:15 (Anderson).

[9] Henshaw Demonstrative Slides at 49 (GST-16003).



Thus, the evidence showed that the comparative exposure from gaskets, even in the highest typical contact occupation, is well below one percent. Even Committee expert Dr. Welch grudgingly agreed that exposures of less than one percent raise questions for her about whether that small a comparative contribution was causative.[10]

This analysis was supported by the testimony of the Debtors' other industrial hygiene experts, Mr. Liukonen and Mr. Boelter, as well as Captain Wasson, each of whose testimony confirmed the way Garlock's asbestos containing gaskets were used in the settings in which potential claimants were exposed, confirmed the miniscule exposure to asbestos that would be expected from working with Garlock's asbestos-containing gaskets alone, and confirmed the massive exposures those potential claimants would have to asbestos-containing insulation

[10] Tr. 2183:17-20 (Welch).

products. Debtors' epidemiological and medical experts, such as Dr. Garabrant, Dr. Sporn and Dr. Weill, collectively demonstrated that there is no evidence that exposures like those resulting from use of Garlock asbestos-containing gaskets cause mesothelioma.

Juries, however, want to know what really *did* cause the plaintiff's disease. For a typical claim, massive exposure from insulation products so dangerous that they were banned decades ago fully explains why a claimant has mesothelioma.[11] By comparison, any possible exposure a claimant received from gaskets and packing was *de minimis*.[12] Unlike the indefensibly dangerous insulation products, asbestos gaskets and packing are not banned. To the contrary, noted health and safety advocates such as Irving Selikoff and William Nicholson are among the numerous authorities that explain they pose no health risk.[13] No wonder it was exceedingly rare for a plaintiff who succeeded in getting his case to a jury to secure a substantial verdict against Garlock when it could present its full defenses. And no wonder that discovery in this case has shown that all high-dollar verdicts for which Debtors have information were obtained by concealment of evidence of exposure to other products.

Because of other exposures, the vast majority of current and future mesothelioma claimants simply would not be able to get their cases to a jury or sustain a verdict in the rare cases when they secure one. *See, e.g.*, *Moeller*, 660 F.3d at 954-55. Modern case law, in even formerly plaintiff-friendly jurisdictions, rejects minimal exposure cases as a matter of law. Pennsylvania, one of the states in which a large proportion of mesothelioma cases have been filed, is an excellent example. In *Betz v. Pneumo Abex, LLC*, 44 A.3d 27, 56-57 (Pa. 2012), the

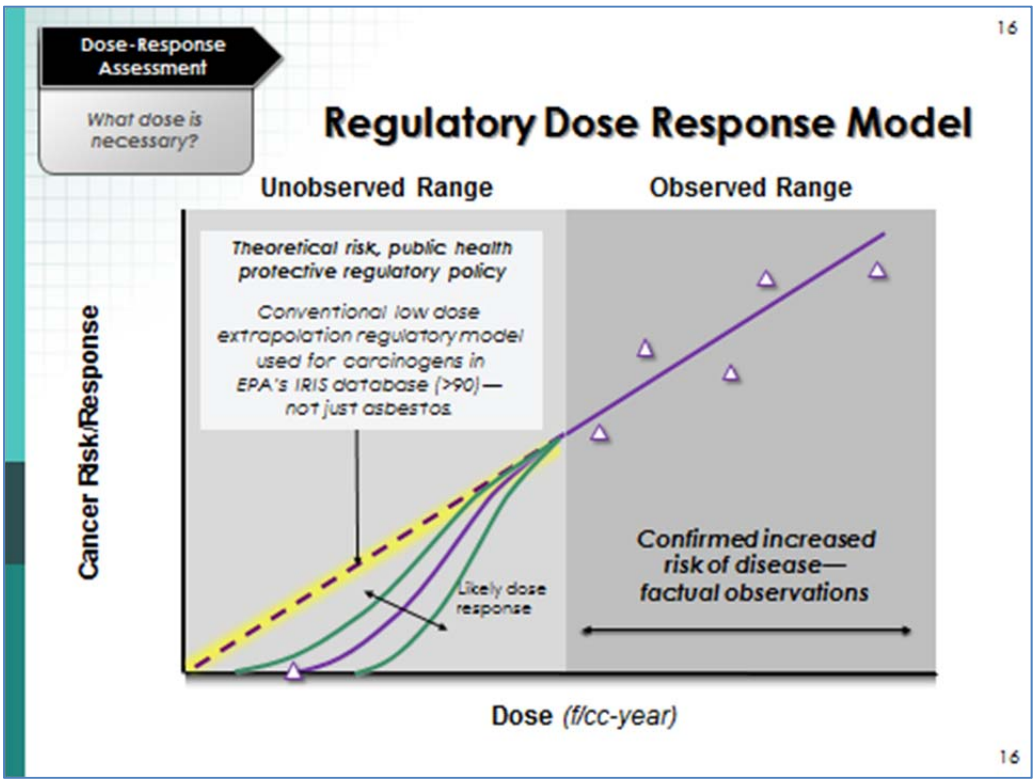
[11] Committee expert Dr. Brodkin confirmed that exposure to asbestos pipe-covering products is a well-documented cause of mesothelioma. Tr. 2001:6-21 (Brodkin). Dr. Brodkin's testimony was consistent with Debtors' evidence that non-Garlock exposures would likely be a significant cause of mesothelioma in virtually all claims against Garlock. Tr. 1009:18-1012:25 (Weill); Tr. 2001:6-21, 2008:21-2009:7, 2012:7-19 (Brodkin).

[12] Henshaw Demonstrative Slides at 49 (GST-16003).

[13] Dr. Selikoff's seminal 1978 text for health professionals—a synthesis of all then-existing literature—contained the statement that gaskets and packing posed "[n]o health hazard in forms used in shipyard application." Tr. 561:5-23 (Liukonen). Dr. Nicholson's opinion was expressed in 1983. Tr. 499:13-500:4 (Sporn).

state's highest court wrote, "[We] do not believe that it is a viable solution to indulge in a fiction that each and every exposure to asbestos, no matter how minimal in relation to other exposures, implicates a fact issue concerning substantial-factor causation in every 'direct-evidence' case." Six weeks ago, the Pennsylvania high court reaffirmed the *Betz* holding. *See Howard v. A.W. Chesterton Co.*, 2013 Pa. LEXIS 2199 (Pa. Sept. 26, 2013) (plaintiffs conceded that under Pennsylvania law after *Betz*, "[t]he test for adequacy is the comparison of the particular product exposure(s) to the totality of the person's asbestos exposures.").

Dr. Anderson explained the scientific unreliability of the foundation of the Committee's low-dose causation opinions. "No safe level" assumptions made in the "zone of inference" for public health protective risk assessment cannot be a basis for scientifically reliable causation determinations.[14]



[14] Tr. 4385:7-4386:4 (Anderson); Anderson Demonstrative Slides at 16 (GST-16008).

Dr. Anderson's analysis conforms to a recent federal court opinion which explains why opinions based on the "no safe level" theory fail under Rule 702: " 'No safe level' addresses risk, not cause, and there is a significant distinction between those two concepts." *Wannall v. Honeywell Int'l, Inc.*, 2013 U.S. Dist. LEXIS 68523, at *50-53 (D.D.C. May 14, 2013) (rejecting assertion that an expert can base his opinion on the theory that "any exposure above what is in the background air" may be considered a cause of mesothelioma).

Public health protective statements—the centerpiece of the Committee's case—cannot be the basis of liability. As Dr. Anderson explained, and as the law holds, these bodies "use conservative assumptions in interpreting the data with respect to carcinogens, risking error on the side of overprotection rather than underprotection." *Indus. Union Dept., AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 656 (1980). Their "analysis involves a much lower standard than that which is demanded by a court of law." *Rider v. Sandoz Pharms. Corp.*, 295 F.3d 1194, 1201 (11th Cir. 2002). It cannot be the foundation for causation opinions. *Dellinger v. Pfizer, Inc.*, 2006 U.S. Dist. LEXIS 96355, at *29-31 (W.D.N.C. July 19, 2006) (regulatory reports "fail to test a causal hypothesis and therefore cannot support a causation opinion.").

The typical claimant's task is made even more difficult because he will be trying to prove liability for exposure to Garlock's chrysotile products. The Committee's own expert, Dr. Brody, acknowledged that the "consensus of the medical community" is that chrysotile-induced mesothelioma only occurs with very high exposures" such as occur in "mining situations."[15] The Committee's case, even if it were not based on scientifically unreliable opinions about gasket and packing exposure,[16] purported to establish no more than that episodic exposures to Garlock's

[15] Tr. 1901:3-1902:18 (Brody).

[16] Based on the full record on science established in this case, the opinions the Committee relies upon fail to pass muster under standards for admissibility under *Daubert* applicable here, and even under *Frye* standards, when the proper record is presented to the Court as it was in *Betz v. Pneumo Abex, LLC*, 44 A.3d 27, 56-57 (Pa. 2012). *See*

products were potentially high in some "worst case scenario settings."[17] No Committee expert claimed exposures from Garlock products resulted in lifetime exposures to chrysotile comparable to that of miners. And not even all chrysotile mining populations have a risk. The increased risk has occurred only in mine locations where unusual levels of amphibole asbestiform minerals are also found.[18]

If chrysotile causes mesothelioma at all, its potency is orders of magnitude less on a fiber-per-fiber basis than the amphiboles, which most insulation products contained.[19] Even Committee expert Dr. Welch, a long-time advocate for plaintiffs,[20] grudgingly conceded amphiboles are ten times more potent than chrysotile.[21] When potency is factored into a causation analysis for pipefitters, who worked with and around Garlock gaskets and packing more than any other likely claimant, the relative contribution of Garlock products to causation is even more miniscule. Using the following slide, Dr. Weill compared insulation exposures to gasket and packing exposures when potency is factored into Mr. Henshaw's analysis:[22]

Debtors' Motion to Exclude or Strike Committee Medical Expert Witness Opinions, and Debtors' Motion to Exclude or Strike Committee Industrial Hygiene Expert Witness Opinions. These issues are addressed more fully in Debtors' Reply to Committee's Response and Opposition to Debtors' Motion to Exclude or Strike Committee Medical Expert Witness Opinions, and Debtors' Reply to the Response and Opposition of the Official Committee of Asbestos Personal Injury Claimants to Debtors' Motion to Exclude or Strike Committee Industrial Hygiene Witness Opinions that are filed contemporaneously with this brief.

[17] The Committee relied on the flawed Longo studies. *See* Debtors' Motion to Exclude or Strike Committee Industrial Hygiene Expert Witness Opinions (Docket No. 2985); Debtors' Brief in Support (Docket No. 2986). At most, the studies presented "outlier data" at variance with the reliable studies of typical gasket work. It is telling that the Committee attempted to "normalize" the unreliable Longo data by reference to the so-called Shell study (a handwritten sample sheet that is not the kind of study that would be relied upon by an industrial hygienist. Tr. 604:4-13, 610:21-611:19 (Liukonen). The Shell sample sheet stated: "simulates worst case situation." Tr. 612:25-613:22 (Liukonen). Even Committee expert Dr. Brodkin admitted "it would not be scientifically valid to make conclusions about the levels of exposure from typical workplace activities with gaskets, based primarily on worst case scenario data." Tr. 2015:3-10 (Brodkin).

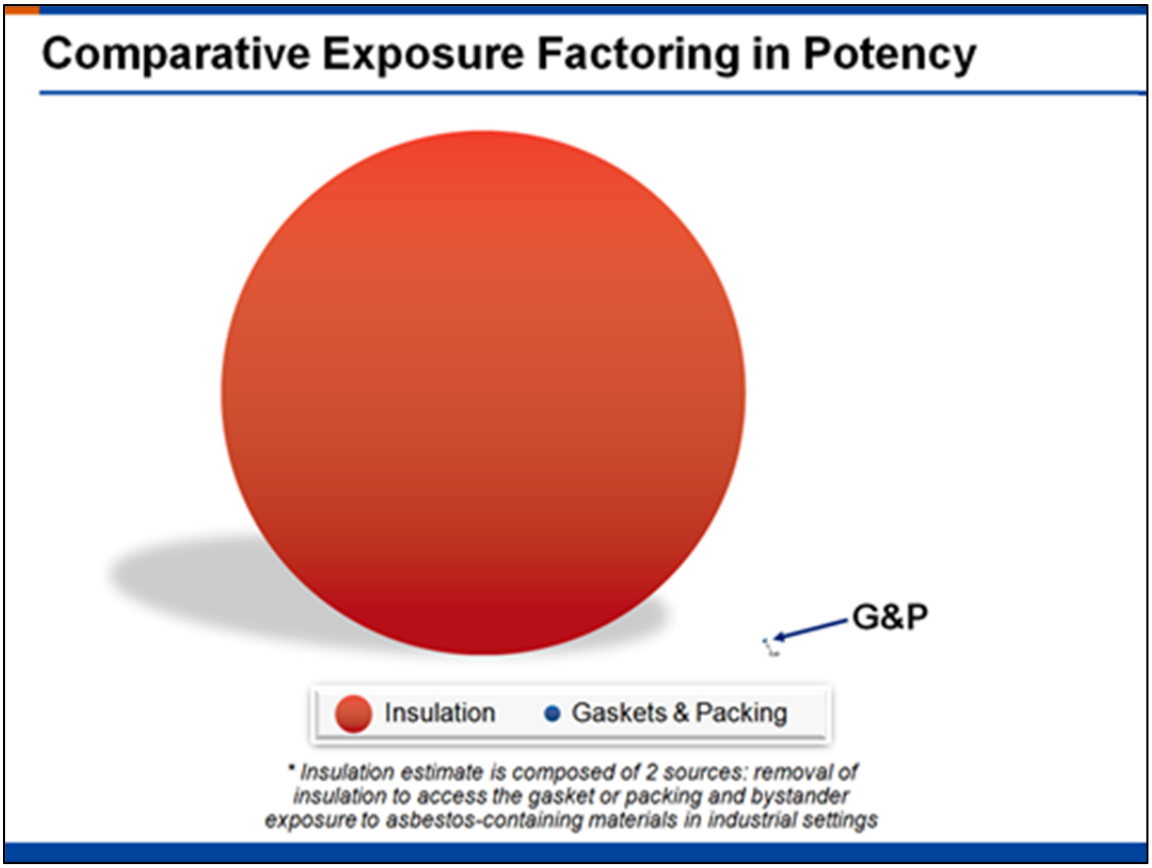
[18] Some chrysotile miners' increased risk from exposures to high levels of amphibole contamination in the mines should not be conflated with any end user's potential to be exposed to extremely low levels of amphiboles in Garlock's chrysotile gaskets. As Committee expert Dr. Longo concedes, this contamination, if it even exists, is at "ultra trace" levels that do not pose risk. Tr. 1612:16-1613:13 (Longo).

[19] Tr. 1001:5-1002:23 (Weill).

[20] Tr. 2162:24-2163:4 (Welch).

[21] Tr. 2187:23-2188:18 (Welch).

[22] Weill Demonstrative Slides at 54 (GST-16007).



B. Garlock's defense depended upon showing courts and juries the true cause of plaintiffs' mesotheliomas

At the estimation trial, Garlock proved that it offered this science and medical evidence to defend mesothelioma claims against it. There is no dispute that Garlock's defense relied on exculpatory evidence that plaintiffs had substantial exposures to friable, amphibole insulation products that dwarfed any possible fiber release from Garlock's products. Witnesses for all of the estimation parties agreed.

1. Garlock's witnesses explained how crucial exposure evidence was to Garlock's cases

For instance, the Court heard testimony from John Turlik, Garlock's trial and eastern regional counsel and David Glaspy, Garlock's trial and western regional counsel. Both of those witnesses testified about the importance of this kind of evidence to Garlock's trials and how the

absence of that evidence impacted settlements and verdicts. Mr. Turlik testified that Garlock's defense involved not only showing the jury that Garlock's products were incapable of causing mesothelioma and other asbestos-related diseases, but also providing the jury evidence of what did cause the disease.[23] This evidence was significant, Mr. Turlik said:

> These thermal insulation products by and large were [ ] amphiboles, so, a very potent form of asbestos, and they were all high dose in their usage. So it was very important to show not only [Garlock] didn't do it, [Garlock] couldn't cause the disease, but to give the jury who actually did cause the disease. So it was an important part of the defense.[24]

Mr. Glaspy likewise emphasized: "[I]t became obvious to me it was imperative that you had to tell the jury up front right away what was the cause of that plaintiff's mesothelioma."[25] "Every case that I tried for Garlock, the first issue as I said, is to show the exposure to the amphibole-containing insulation product as the undisputed cause of disease."[26]

Mr. Rick Magee, General Counsel to EnPro Industries, Inc. who had ultimate responsibility for the management of asbestos litigation against Garlock,[27] further explained that evidence about plaintiffs' exposures to friable products was as important to fact finders as evidence that Garlock's low-dose chrysotile products did not cause mesothelioma:

> [T]he defense was that [Garlock's] products didn't cause disease and, secondly, and importantly, was the bucket in the ocean; the fact that its product didn't cause disease and that in pointing to and identifying what products did. Obviously, [Garlock] could demonstrate the bucket. It also needed to demonstrate the ocean, and that's what we did. That was Garlock's defense at trial all the time.
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> . . .

[23] Tr. 2238:2-7 (Turlik) ("So we would not only show the jury that Garlock's products were incapable of causing these diseases; we would actually show them, during the '90s, who did cause those diseases, because there would be extensive testimony as to these workers' exposure to thermal insulation products.").
[24] Tr. 2239:13-19 (Turlik).
[25] Tr. 4529:12-15 (Glaspy).
[26] Tr. 4530: 5-7 (Glaspy).
[27] Tr. 1386:8-14 (Magee).

> [P]eople involved in litigation knew that's what the litigation was about. The litigation was about exposures. It was about -- it was about relative exposures.[28]

2. Committee witnesses likewise recognized that evidence of exposure to other companies' products was material to Garlock's settlements and defense at trial

Witnesses affiliated with the Committee also testified that this kind of evidence was material to Garlock's defense. For instance, the Committee called Paul Hanly, a lawyer who managed the defense of asbestos giant, Turner & Newall ("T&N") (later Federal Mogul), who is now a plaintiff mass tort lawyer. On cross-examination, when discussing the defense of T&N gasket maker subsidiary, Flexitallic, Mr. Hanly admitted that evidence of plaintiffs' exposures to other companies' products was at the heart of the defense for low-dose chrysotile defendants. When confronted with Flexitallic's past filings (which Debtors obtained independently), Mr. Hanly conceded that this evidence was "crucial" to that gasket-maker's defense. When asked whether exposure evidence was, in fact, "crucial to the defense theory for all low-dose chrysotile defendants," Hanly said, "[i]t's certainly crucial in *many low-dose cases*, I certainly will give you that." Tr. 3829: 15-19 (Hanly) (emphasis added).

Other plaintiffs' attorneys likewise admitted that they knew well that this evidence drove Garlock's defense and hence its settlement decisions. For instance, plaintiff attorney Jeffrey Simon, from the Simon Greenstone Panatier Bartlett firm ("Simon Greenstone") (formerly Simon Eddins Greenstone), testified at deposition that it was "a common theme in cases where chrysotile defendants would try to find evidence of a plaintiff's exposure to amosite and

[28] Tr. 2563:24-2564:5, 2564:15-18 (Magee); *see also* Tr. 2571:23-2572:3 (Magee) ("Jurors want to figure out what happened. It's not enough for a lot of jurors to know that Garlock's product didn't cause the disease. They want to know what product did cause the disease. It was important for Garlock to be able to identify thermal insulation as part of its defense."); Tr. 1409:6-9 (Magee) (testifying that cases where "claimants would demand much higher payments," or force Garlock to trial, "in those cases, it was very important what that exposure evidence was.").

crocidolite asbestos."[29] Garlock (as well as others) commonly contended that the plaintiffs' mesothelioma was not caused by chrysotile products, but by amosite or crocidolite products.[30]

Similarly, Mark Iola, an attorney affiliated with Waters & Kraus LLP ("Waters & Kraus") who tried cases against Garlock in the late 1980s and 1990s and negotiated on Waters & Kraus's behalf in the decade prior to Garlock's bankruptcy filing, explained that Garlock's defense hinged on showing that a plaintiffs' exposures to other companies' products dwarfed their contact with Garlock's products:

> So from day one, I understood that the way Garlock was going to defend these cases was to try to demonstrate to juries that Garlock was either *de minimis*, shouldn't count at all, or if they should count, they should count at a very diminished rate as compared to the rest of his exposures.[31]

C. The Bankruptcy Wave deprived Garlock of exposure evidence plaintiffs had freely provided before, increasing Garlock's costs and trial risk

Consistent with the strength of its defenses, before its major co-defendants filed for bankruptcy in 2000 (the "Bankruptcy Wave"), Garlock paid small amounts to settle mesothelioma claims and was extraordinarily successful in the mesothelioma claims tried to verdict against it.

In the late 1990s, Garlock paid on average $5,000 to settle mesothelioma claims.[32] These payments were motivated by a desire to save the cost of paying lawyers and other costs to defend the claims.[33] Garlock also won 92% of the mesothelioma cases taken to verdict against it, despite the fact that these cases were specially selected by plaintiffs' lawyers and were among the strongest cases against Garlock.[34] Its settlements were driven entirely by the cost of defense—

[29] 1/14/13 Simon Dep. at 40:24-41:3.
[30] 1/14/13 Simon Dep. at 27:18-28:2.
[31] Iola Dep. at 59:10-16.
[32] Tr. 1389:18-1390:5 (Magee).
[33] Tr. 1390:1-1391:7, 1391:11-1392:4 (Magee).
[34] Tr. 1395:17-1396:13 (Magee).

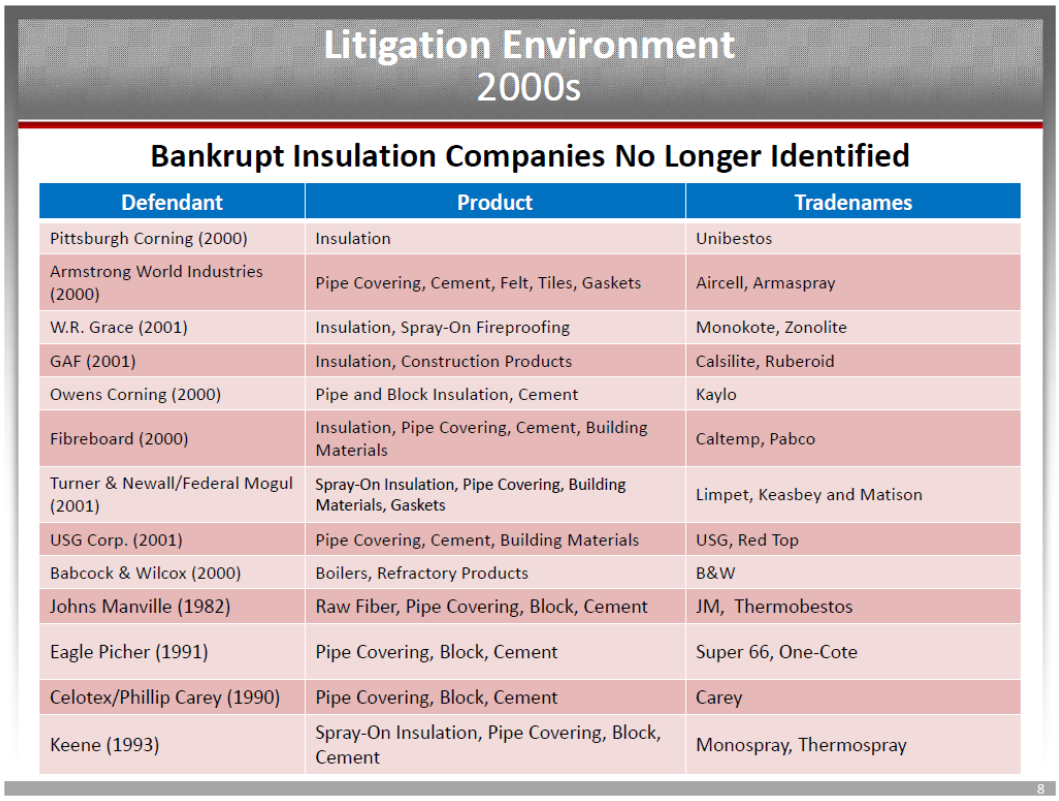
because it cost Garlock between $50,000 and $100,000 to defend cases to verdict during this period, $5,000 settlements were an economically attractive option.[35]

Beginning in 2000, however, the major defendants in asbestos litigation began to file for bankruptcy relief.[36] These were companies that paid the lion's share of settlements and many of which manufactured products such as friable asbestos insulation that they acknowledged were dangerous.[37] They included Owens Corning (which produced Kaylo insulation), Pittsburgh Corning (which produced Unibestos), and W.R. Grace.[38] It was a wave because when these companies filed, they precipitated numerous additional bankruptcies.[39] Garlock had often been sued alongside those top tier companies before the Bankruptcy Wave because Garlock's gaskets and packing were used alongside of their insulation products.[40]

After the Bankruptcy Wave, the litigation environment changed for Garlock. After top-tier companies exited the litigation, there was a substantial decrease in the identification of evidence of exposure to those companies' products in cases against Garlock. Both Mr. Turlik and Mr. Glaspy testified that after those top-tier companies filed for bankruptcy, testimony concerning exposures to their products disappeared. Mr. Turlik explained: "Well, as these companies left the litigation, to some degree testimony concerning exposures to them left the litigation. We were not hearing their names nearly as much as we did in the 1990s."[41] Evidence of exposure to products made by the companies listed in Mr. Turlik's demonstrative exhibit

[35] Tr. 1397:5-20 (Magee).
[36] Tr. 1404:4-23 (Magee).
[37] Tr. 1404:24-1405:2 (Magee); Tr. 1158:15-1159:20 (Brickman); *see also* Mark A. Peterson, W.R. Grace Projected Liabilities for Asbestos Personal Injury Claims as of April 2001 (Rev. Jan. 2009) at 25-26 (GST-6574).
[38] Tr. 1404:20-23 (Magee).
[39] Tr. 1405:3-7 (Magee).
[40] Tr. 1405:8-1406:3 (Magee).
[41] Tr. 2251:24-2252:2 (Turlik).

below, he explained, was disclosed prior to the Bankruptcy Wave. But that evidence disappeared from high value litigation cases after the Bankruptcy Wave.[42]



Litigation Environment
2000s

Bankrupt Insulation Companies No Longer Identified

Defendant	Product	Tradenames
Pittsburgh Corning (2000)	Insulation	Unibestos
Armstrong World Industries (2000)	Pipe Covering, Cement, Felt, Tiles, Gaskets	Aircell, Armaspray
W.R. Grace (2001)	Insulation, Spray-On Fireproofing	Monokote, Zonolite
GAF (2001)	Insulation, Construction Products	Calsilite, Ruberoid
Owens Corning (2000)	Pipe and Block Insulation, Cement	Kaylo
Fibreboard (2000)	Insulation, Pipe Covering, Cement, Building Materials	Caltemp, Pabco
Turner & Newall/Federal Mogul (2001)	Spray-On Insulation, Pipe Covering, Building Materials, Gaskets	Limpet, Keasbey and Matison
USG Corp. (2001)	Pipe Covering, Cement, Building Materials	USG, Red Top
Babcock & Wilcox (2000)	Boilers, Refractory Products	B&W
Johns Manville (1982)	Raw Fiber, Pipe Covering, Block, Cement	JM, Thermobestos
Eagle Picher (1991)	Pipe Covering, Block, Cement	Super 66, One-Cote
Celotex/Phillip Carey (1990)	Pipe Covering, Block, Cement	Carey
Keene (1993)	Spray-On Insulation, Pipe Covering, Block, Cement	Monospray, Thermospray

8

The FCR contended at trial that "the [2005] pipefitter has the same exposure to the same types of products" as the 1995 pipefitter.[43] When asked about the FCR's contention, Mr. Turlik agreed that what the FCR asserted was true, but explained that Garlock "[was]n't hearing about the same exposures in evidence [in 2005]."[44] "[T]he extensive testimony of thermal insulation exposure, the one part of Garlock's defense, and that is comparing the exposures to Garlock to the thermal insulation, was removed or, at least in large parts, reduced."[45]

Mr. Glaspy observed the same phenomenon:

[42] Turlik Demonstrative Slides at 9 (GST-8000); Tr. 2250:24-2252:2; 2252:14-25 (Turlik).
[43] Tr. 101:11-14 (Opening Statement, Future Claimants Representative).
[44] Tr. 2252:12-13 (Turlik).
[45] Tr. 2252:17-21 (Turlik).

> [Y]ou didn't see the disclosure of any asbestos insulation products in things like answers to interrogatories. In depositions, the plaintiffs could no longer remember names or products, they remember seeing it. If they did, they claimed they saw a little bit of it. It was minimized.[46]

And Mr. Magee saw the same thing:

> The thing that changed in the 2000s was that -- and we've talked about that, the ocean -- the ocean shrunk, even disappeared in some cases. So we still had the bucket and we still had evidence of the bucket; we needed to have the evidence of the ocean so we could demonstrate the bucket in the ocean.[47]

The phenomenon was not universal to every asbestos plaintiffs' firm, but was nonetheless widespread—particularly among those firms who made demands that had the most dramatic impact on Garlock's mesothelioma settlement averages in the 2000s.[48] Mr. Glaspy compared cases between different firms to illustrate the changes in the identification of exposure after the 2000s by plaintiffs firms who demanded large settlements.

He compared the disclosures by the Brayton Purcell firm in the 2003 Ronald Lunsford case to the disclosures by Simon Greenstone in the 2008 Howard Ornstein case. Mr. Lunsford was a Navy storekeeper and Mr. Ornstein was a Navy electrician. Both plaintiffs would have been expected to have come into contact with similar asbestos products, but discovery responses between the firms widely varied. In interrogatory responses, both plaintiffs identified low-dose, chrysotile gaskets, packing, and friction products—the kind manufactured by non-bankrupt defendants. In the Lunsford case, counsel *also* identified friable, amphibole products of Johns-Manville, Owens Corning, Pittsburgh Corning and others. By contrast, Simon Greenstone in the Ornstein case did not identify a single product for which any bankrupt company was responsible, let alone friable, amphibole insulation products.[49]

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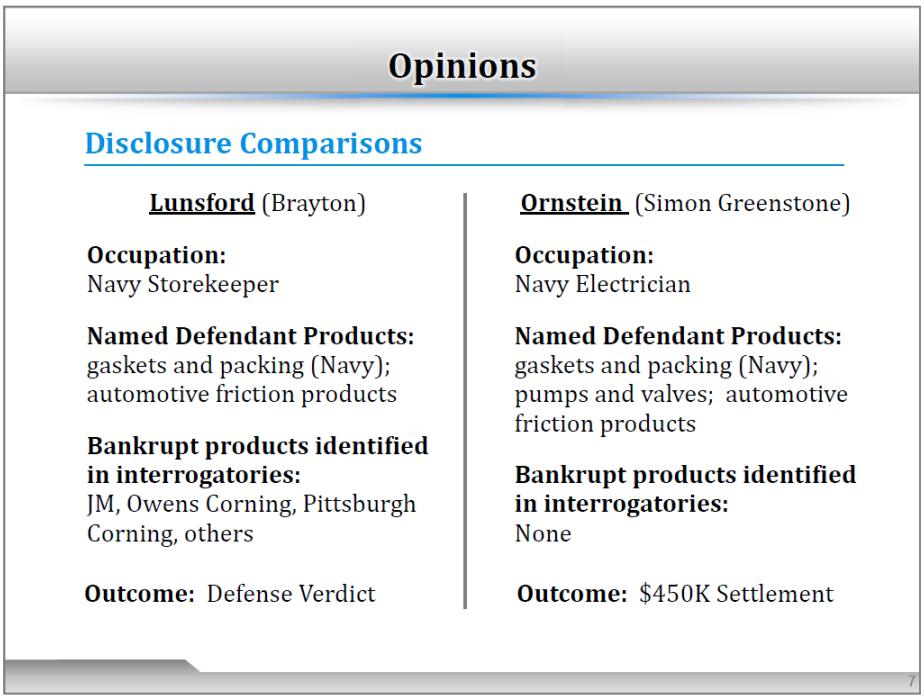
[46] Tr. 4533:25-4534:4 (Glaspy).
[47] Tr. 2571:13-19 (Magee).
[48] *See, e.g.*, Tr. 3069:16-3072:1 (Magee); 2252:14-2252:25, 2257:21-2258:7 (Turlik).
[49] Glaspy Demonstrative Slides at 7 (GST-8024); Tr. 4534:19-4537:9 (Glaspy).



Not coincidentally, Brayton Purcell's settlements did not rise after the Bankruptcy Wave and never approached the high settlement demands made by firms with discovery practices like Simon Greenstone.

In case after case after the Bankruptcy Wave, Garlock faced cases from firms who demanded high settlements for plaintiffs who professed to lack evidence of exposure, even though the occupational histories of those plaintiffs historically included substantial exposure to dusty amphibole products that were the known cause of their disease. Mr. Magee explained that in the period after the Bankruptcy Wave, circumstances where evidence was absent compared to Garlock's experience before the Bankruptcy Wave were acute in so-called "driver" cases, that is, cases where a plaintiffs' firm would "focus on, target Garlock on, threaten to take it to trial to get a verdict to try to drive higher settlements . . . . It was trying to drive the settlement amounts

up."[50] "[T]hat evidence was no longer readily available. Particularly in the cases that the plaintiffs' lawyers were using to drive up the settlement averages."[51]

Garlock's settlements increased after the Bankruptcy Wave, for two reasons. First, the cost of defending claims "went through the roof," because plaintiffs who used to readily acknowledge that they worked around asbestos insulation (such as Kaylo and Unibestos) suddenly were no longer identifying those companies.[52] Garlock had to hire navy and industrial experts to examine plaintiffs' occupational histories and provide opinions about the products that plaintiffs would have been exposed to because plaintiffs in these cases did not acknowledge exposures. Garlock also used transcripts of co-workers, and sought facility, ship, and worksite records to try to identify potential exposures. At times, Garlock sought discovery directly from asbestos Trusts where plaintiffs may have filed claims and, whenever possible, sought to compel plaintiffs to produce claims they had made to asbestos Trusts.

Trial costs "went through the roof," increasing as much as five and ten times the amounts Garlock experienced in the 1990s.[53] Mr. Magee, in his testimony, explained how these costs went up:

> So the cost of defending went up, it escalated. Garlock started hiring experts, Your Honor, like Captain Wasson to come into the courtroom and explain to the court and to juries how that insulation was there in the same location with its gaskets. And so obviously that costs considerable dollars, the costs of defense went up tremendously.[54]

Mr. Magee also compared Garlock's litigation costs before and after the Bankruptcy Wave.[55] That comparison is illustrated by the demonstrative graphic below.[56]

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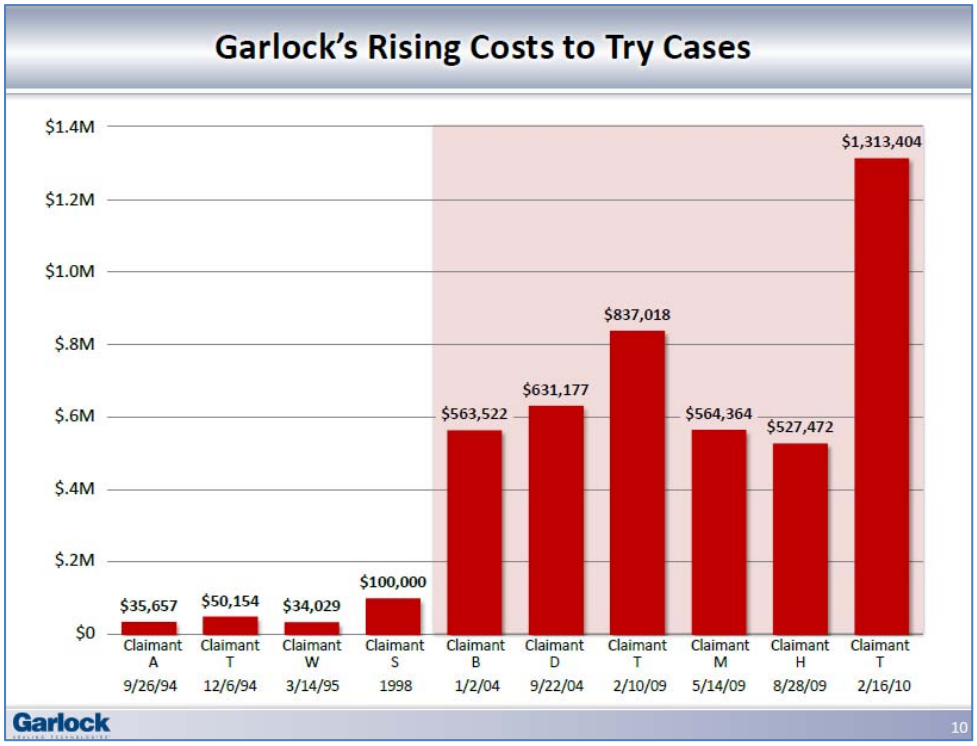
[50] Tr. 1410:18-23 (Magee).
[51] Tr. 1408:24-1409:2 (Magee).
[52] Tr. 1406:22-1407:9 (Magee).
[53] *Id.*
[54] Tr. 1407:13-18 (Magee).
[55] Tr. 2586:7-2587:25 (Magee).
[56] Magee Demonstrative Slides at 18 (GST-8016).



At the same time, the absence of evidence also impacted the risk of an adverse outcome at trial, both in terms of the risk of a plaintiff's verdict and the risk that Garlock's share of that verdict would be larger.[57] Garlock still won most cases during the 2000s, but its success rate went down to 64% during the 2000s, and down to 53% for the first part of that period, 2001 through 2005, just after the Bankruptcy Wave.[58] As Mr. Magee put it,

> Disappearance in those cases of the evidence about the thermal insulation exposures was key because it affected both the likelihood of plaintiff's success. Garlock no longer had a 92 percent-plus chance of winning. And if it were to lose, it affected the compensatory award share. So now you had to take account [in] those cases worked up that way that defendant -- that there was some defendant's expected liability in those cases. In addition, it had a huge impact on the right-hand box because it had a big impact on the cost to defend the cases. So, obviously, the result was that Garlock was willing to pay higher settlement amount[s].[59]

[57] This increase in trial risk was compounded by plaintiff lawyers' funding of junk science, such as a video that Dr. William Longo produced to give the illusion that brushing gasket residue from a pipe flange generates a high level of fiber release. This required Garlock to commission its own experts to debunk this theory. Even then, some plaintiff attorneys maintained the illusion by putting Dr. Longo on in rebuttal, preventing Garlock from rebutting the video. Tr. 2567:14-2569:24 (Magee).
[58] Tr. 2572:4-23 (Magee).
[59] Tr. 2573:20-2574:6 (Magee).

Garlock's efforts to develop exposure evidence without plaintiffs' cooperation often did not reduce these risks. Records, co-workers, and other evidence developed without the plaintiff put products in a plaintiff's vicinity, but without the plaintiff's acknowledgement, did not demonstrate that the plaintiff in fact inhaled fibers from those products. Typically, in high settlement demand cases, when faced with documents, co-worker testimony, expert exposure testimony, and the like, plaintiffs denied exposure or knowledge of exposure. This led judges to exclude companies from verdict forms and juries to disregard Garlock's evidence.[60]

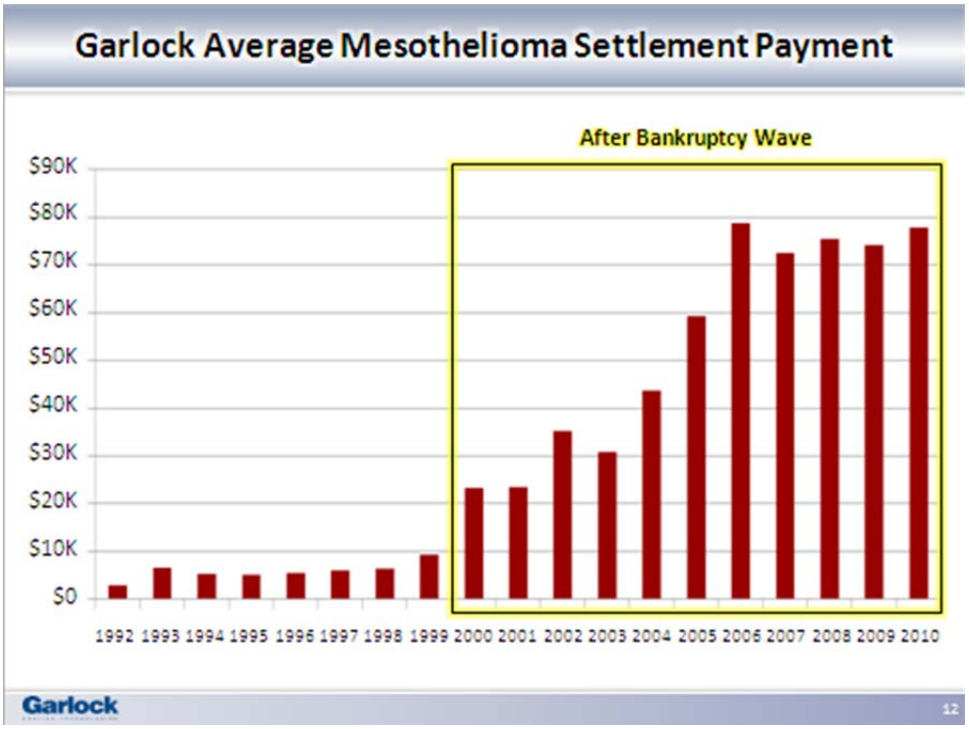
For instance, Mr. Glaspy explained, in the 2004 Robert Treggett case, Garlock called two naval experts, Commander James Delaney and former naval medical officer Dr. Robert Sawyer, to testify that Mr. Treggett would have encountered Unibestos amphibole insulation as a machinist mate assigned to nuclear submarines.[61] Mr. Treggett, however, denied knowledge of that exposure, and the court barred Garlock from arguing to the jury that Pittsburgh Corning, the maker of Unibestos, should be assigned any responsibility for causing Mr. Treggett's mesothelioma.[62]

Similarly, Mr. Turlik detailed, in the Peter Homa case, Garlock hired Captain Charles Wasson to examine ship records to show the plaintiff's exposure to other companies' products.[63] The plaintiff there also denied exposures based on evidence Garlock developed. Without plaintiff's admissions, Mr. Homa was able to call an industrial expert to offer an opinion that those other products did not contribute to Mr. Homa's exposure.[64] In cases such as these,

[60] Tr. 2252:14-2255:21 (Turlik).
[61] Tr. 4580:23-4581:3 (Glaspy).
[62] Tr. 4581:25-4582:8 (Glaspy).
[63] Tr. 2308:20-25 (Turlik).
[64] Tr. 2309:2-24 (Turlik) (describing testimony of Richard Hatfield).

Garlock's risk of an adverse verdict increased as did the risk that it would pay a large portion of a judgment.

As a result of increased defense costs and marginally increased trial risk, Garlock's average settlement values for mesothelioma cases that settled—as shown by the demonstrative below—went up by seven times.[65]



These increased expenditures to defend cases at trial, however, paid dividends by the end of the decade. From 2006 to 2010, Garlock won defense verdicts in 13 of 15 cases that went to trial.[66] In the fourteenth case (*Simpson*), Garlock obtained evidence of insulation exposures and the jury allocated almost all of the plaintiff's damages to bankrupt companies.[67] The fifteenth case was *Torres*, which is on appeal and was the subject of discovery in this bankruptcy case (as discussed below).

[65] Magee Demonstrative Slides at 12 (GST-8017); Tr. 2575:10-24 (Magee).
[66] Tr. 2584:14-23 (Magee).
[67] Tr. 2585:13-22 (Magee).

But the need to incur these expenses to win made it economically attractive to pay $70,000 to settle a case rather than the half million it now cost to try a case.[68]

D. The funding of Trusts with billions of dollars for plaintiffs exposed to the debtors' friable products should have restored plaintiffs' admissions of exposure to those products in litigation against Garlock, but did not

Garlock expected that once its former major co-defendants emerged from bankruptcy and established Trusts to pay claims against them, plaintiffs would once again identify their exposures, decreasing Garlock's litigation costs and trial risks.[69] When this did not happen, Garlock began to seek Trust claims in discovery.[70]

In cases where Garlock obtained this discovery, its trial risk did indeed decrease. Messrs. Turlik and Magee testified about the *Messinger*, *Dougherty*, and *Davis* cases where Garlock compelled the production of Trust claims and was able to present its full defense at trial.[71] In those cases, Garlock won defense verdicts. In a fourth case where Garlock obtained Trust claim forms, *Simpson*, bankruptcy product exposure information provided by the plaintiff led the jury to assign Garlock a small 2% share of a verdict, while assigning 98% to others, including 85% to insulation companies.

But usually, Garlock was not successful in obtaining Trust claim discovery.[72] Garlock discovered that, in the words of Mr. Magee, the "system had been rigged:"[73] Trust Distribution Procedures ("TDPs") regulated how claims brought against Trusts by plaintiffs' lawyers would be paid.[74] The leading plaintiffs' firms constituted the official asbestos committees in the chapter

[68] Tr. 2586:7-2587:25 (Magee).
[69] Tr. 2576:15-2577:23 (Magee).
[70] Tr. 2580:3-5, 2581:18-2582:2 (Magee).
[71] Tr. 2580:14-25 (Magee); *see also* Appendix, Debtors' Summary of Evidence Regarding Certain RFA List 1.A Cases, at 56-57 (summarizing *Davis*, *Dougherty*, and *Messinger* cases).
[72] Tr. 2580:12-13 (Magee).
[73] Tr. 2582:3-9 (Magee).
[74] Tr. 1170:9-11 (Brickman).

11 cases and the plans of reorganization including the TDP were written almost exclusively by these lawyers.[75] The TDP made exposure evidence Garlock expected to come back into the system confidential and very difficult for defendants to obtain.[76] The Trusts have (1) confidentiality provisions; (2) "sole benefit" provisions; and (3) claims deferral and withdrawal provisions that together allow plaintiffs to withdraw or defer Trust claims and keep them secret until their tort claims are over.[77] The sole benefit provision was particularly disturbing in the way it invited abuse.[78] A claimant can recover from a Trust notwithstanding the fact that the claimant did not identify, or even denied, Trust product exposure in a tort action:[79] Mr. James Patton, an attorney for FCRs in asbestos bankruptcy cases who was retained as an expert by the Committee, admitted that both the confidentiality and sole benefit provisions are intended to increase plaintiffs' negotiating leverage against tort system co-defendants.[80]

Evidence from discovery in these cases showed that the very exposure evidence that Garlock sought, at great cost—evidence plaintiffs' attorneys knew was material to Garlock's defense and settlement—was available to plaintiffs and their lawyers but withheld from Garlock. Cases where Garlock paid the highest settlements reflected a practice of plaintiffs' firms deying Garlock access to exposure evidence to increase settlement payments.

At trial, Garlock presented evidence about the practices of five prominent mesothelioma trial firms and one bankruptcy-claim "referral firm" and documentary evidence from fifteen plaintiffs (the "Designated Plaintiffs") represented by those firms. This evidence demonstrated that plaintiffs' counsel's failure to disclose evidence was a pervasive practice in Garlock's most

[75] Tr. 1169:20-1170:3 (Brickman).
[76] Tr. 1170:12-24 (Brickman).
[77] Tr. 2582:10-18 (Magee).
[78] Tr. 2582:24-2583:19 (Magee).
[79] *Id.*
[80] Tr. 3753:7-25, 3755:7-3756:24 (Patton).

significant settlements and trials after the Bankruptcy Wave. Garlock also presented evidence about 205 mesothelioma cases that Garlock resolved (the "RFA-1 Cases") where plaintiff' discovery responses conflicted with submissions to Delaware Claims Processing Facility ("DCPF") Trusts and with ballots cast in asbestos bankruptcy cases.

1. Plaintiffs' firms employed regular practices to deny Garlock evidence

Depositions of firms that represented the Designated Plaintiffs yielded concessions from those firms that they engaged in routine practices designed to keep defendants, such as Garlock, from obtaining bankruptcy Trust claim evidence for the purpose of maximizing settlement payments. Each of those firms, three of which are members of the Committee, obtained large settlements from Garlock and represented plaintiffs in many different jurisdictions, including significant jurisdictions such as Philadelphia, New York City, and Los Angeles.

For instance, Peter Kraus, the Rule 30(b)(6) designee for Waters & Kraus, testified that his firm delays the filing of bankruptcy Trust claims to deny defendants the benefit of that information at trial—particularly if that information would reduce those defendants' share of a judgment.[81] According to Mr. Kraus, it would be typical for his firm to delay filing wherever filings could lead to "plac[ing] the bankrupt defendants' products on the verdict form and allow[ing] the defendants in the litigation case to argue for a smaller share of the several liability."[82]

Similarly, Benjamin Shein, the 30(b)(6) designee of the Shein Law Center conceded, "We file trust claims after the completion of the tort litigation."[83] When asked what purpose his firm had in waiting to file Trust claims, he said:

[81] Kraus Dep. at 41:5-42:14.
[82] *Id*. at 42:7-10.
[83] Shein Dep. at 43:24-25.

> My duty to these clients is to maximize their recovery, okay, and the best way for me to maximize their recovery is to proceed against the solvent viable non-bankrupt defendants first, and then if appropriate, to proceed against the bankrupt companies.[84]

Mr. Shein explained (like Mr. Kraus) that delayed filings directly impacted the litigation (thus maximizing values) because by delaying those filings plaintiff lawyers increased the liability shares of tort system defendants at trial. Mr. Shein further explained that delaying filings avoids the risk that a jury assigns all or part of liability to the bankrupt company instead of the tort defendant: "if a bankrupt claim is paid, not only filed but paid, that bankrupt payment claim, that defendant, would go on the verdict sheet and be eligible to be a share which the jury could consider."[85]

Testimony from Stephen Cooper, the 30(b)(6) designee of the David Law Firm, confirmed that delaying bankruptcy filings to benefit plaintiffs was a routine practice among all the co-counsel firms with which the David firm worked. The David firm limits its practice to working up cases to make bankruptcy claim filings.[86] It refers its clients to other law firms to serve as co-counsel in order to pursue claims in the tort system against companies not in bankruptcy.[87] The David firm's regular co-counsel firms include prominent mesothelioma attorneys and firms Baron & Budd,[88] Shingler & Simon, the Simmons Law firm, attorney Phil Harley,[89] Waters & Kraus,[90] and Belluck & Fox.[91]

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[84] *Id*. at 44:4-9.
[85] *Id*. at 44:12-16.
[86] Cooper Dep. at 15:4-7.
[87] *Id*. at 33:13-15; 38:1-10.
[88] *Id*. at 33:10-12.
[89] Mr. Cooper testified that Mr. Harley was associated with the firm Paul, Handley & Harley, *see* Cooper Dep. at 53:25-54:2; although Mr. Harley appears to have been associated with the Kazan McClain law firm before his death in 2009. *See* http://www.kazanlaw.com/about-kazan-law/our-attorneys/philip-a-harley.
[90] Cooper Dep. at 53:5-54:4; *see also* Extract from David Law Firm Website (GST-0449) (listing various cases where David firm was co-counsel with other firms).
[91] *Id*. at 62:13-15.

These co-counsel, Mr. Cooper testified, guide the decision as to whether to delay the filing of a Trust claim. Although the David Law firm's general policy is to file Trust claims "as quickly as we can" without input from tort system counsel, co-counsel have input into the decision to delay filing where necessary "to represent the client as well as possible."[92] According to Mr. Cooper, tort system trial counsel will provide "an indication to delay the filing of a claim,"[93] and in such instances, "[t]he David Law Firm would have the information it needs to file a claim, but the client and the 2 firms that represent it would make a decision as to delay that filing."[94] The document discovery from the Designated Plaintiffs showed that counsel delayed filing numerous claims to deny defendants information in every case.

2. Evidence from the Designated Plaintiffs showed pervasive non-disclosure and concealment in every case

Discovery from the Designated Plaintiffs demonstrated extensive exposure to bankrupt companies' highly friable products that was not disclosed to Garlock. On average, plaintiffs omitted exposures to nearly 19 (18.9) companies' products, including more than 13 (13.5) exposures to insulation companies' products. At the same time, on average, they disclosed exposures to only two (2.2) bankrupt companies' products. Plaintiffs denied exposures or knowledge of exposure consistently in these cases, only to file claims against reorganized companies (or vote ballots as creditors) based on the very evidence they failed to provide. Specifics of some of the Designated Plaintiffs' cases are featured below, but common to each of the cases is the following:

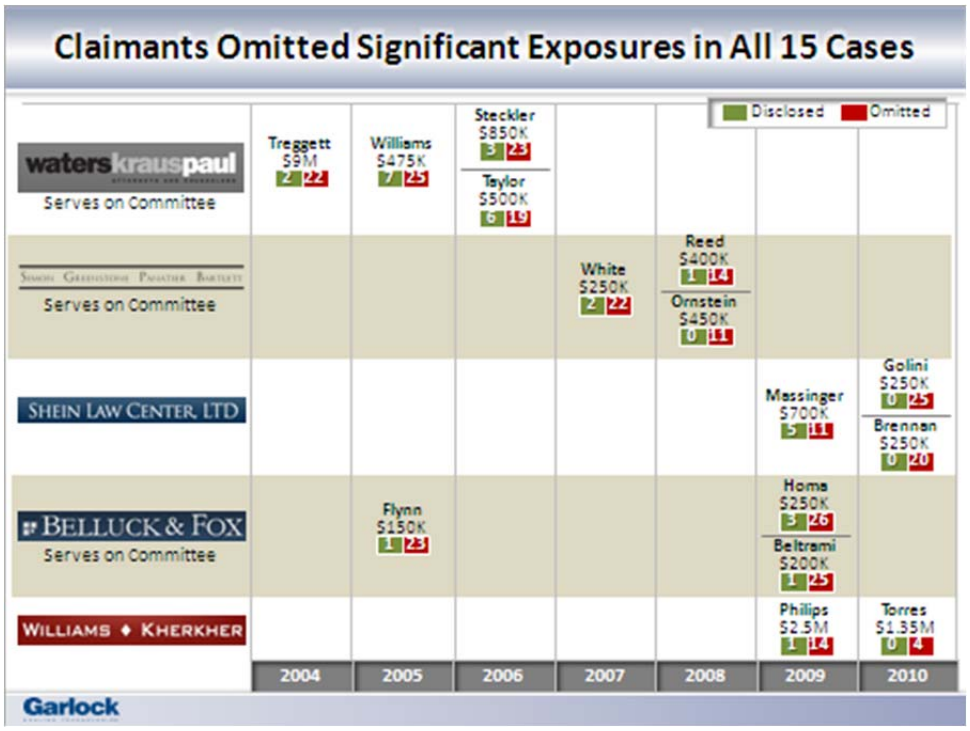
[92] *Id*. at 45:4-5.
[93] *Id*. at 45:7-8.
[94] *Id*. at 45:9-13.

1. The omitted evidence impacted Garlock's settlement of the cases that were settled.[95]

2. The fact patterns demonstrated by the Designated Plaintiffs are ones that tended to drive up Garlock's settlements and reflect example "driver cases" that affected settlements in other cases.[96]

3. In each of these Designated Plaintiff cases, information was omitted in the face of pointed discovery requests seeking the information, standard discovery mandating production, and/or asbestos orders requiring production.

Below is a summary of the Designated Plaintiffs that lists the trial firm, the date of resolution with Garlock, the amount of payment by Garlock, and the numbers of disclosed and omitted bankrupt exposures based on document discovery:[97]

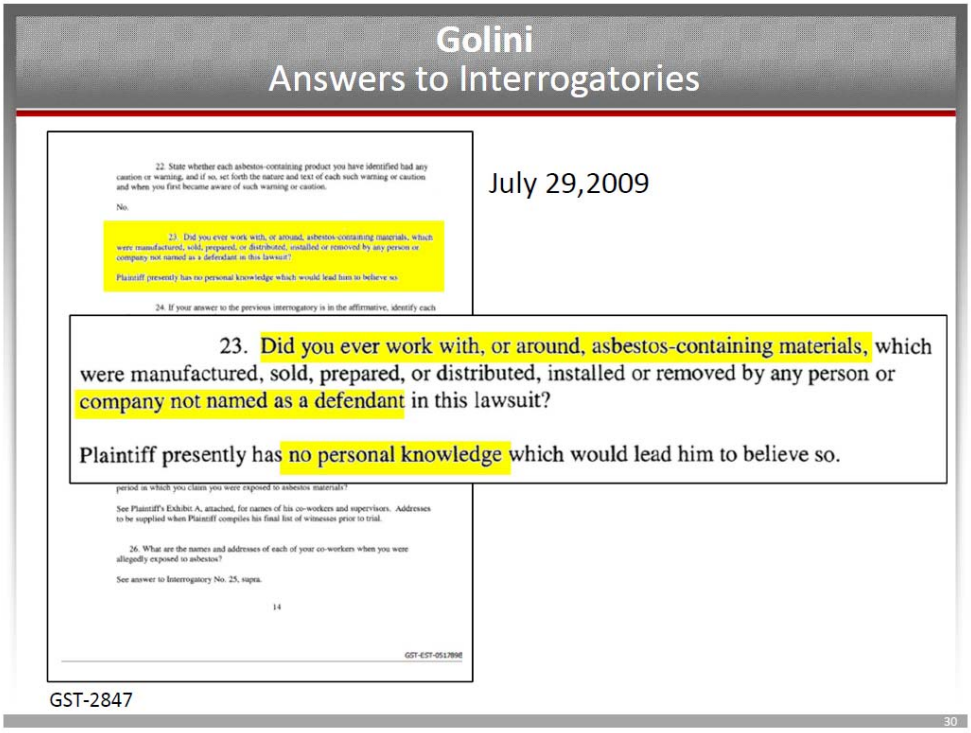


At trial, Garlock witnesses testified about the details of these cases and how the hidden evidence affected settlements and trial results.[98]

Vincent Golini, Shein Law Center, Philadelphia, 2009-10, $250,000 Settlement.

[95] Tr. 3089:13-16 (Magee).
[96] Tr. 3089:20-3090:13 (Magee).
[97] Magee Demonstrative Slides at 12 (GST-8018).
[98] *See, e.g.*, Tr. 1195:9-1205:7 (Brickman).

Mr. Turlik, for instance, described how concealed exposure evidence in the Vincent Golini case altered that case's resolution. Mr. Golini was a laborer and apprentice pipefitter in the Philadelphia shipyards, represented by the Shein Law Center.[99] Although Mr. Golini was a shipyard worker at a site and in an occupation known to have exposures to the friable, amphibole products of bankrupt companies, he failed to identify any exposure to bankrupt companies' products.[100] As depicted in the demonstrative below, Mr. Golini's written interrogatory responses plainly represented that he had no personal knowledge of exposures to bankrupt companies' products.[101]



[99] Tr. 2279:10-13 (Turlik); Shein Dep. at 39:16-40:6.
[100] Tr. 2279:10-2280:5 (Turlik).
[101] Tr. 2279:18-2280:5 (Turlik); Turlik Demonstrative Slides at 15 (GST-8000); *see also* Plaintiffs' Answers to Asbestos Claims Facility Defendants' General Interrogatories—Sets I and II, at 3 (July 29, 2009) (GST-2847) (requiring Mr. Golini to, among other things, "List, by type, brand and/or trade name, and manufacturer, every asbestos-containing product to which you believe you were exposed.").

At deposition, he testified that he had no knowledge of exposures to asbestos companies or their products including, specifically, the Kaylo product, or any products of Owens-Corning, Fibreboard, Eagle-Picher, or Armstrong.[102]

To the extent Mr. Golini acknowledged exposure, Mr. Turlik pointed out, he "minimize[ed] [his] exposure to the thermal insulation products."[103] For instance, this is how Mr. Golini described his contact with pipe covering:

> Q: [By Plaintiff's attorney] . . . Can you state on the video record now as you observed the pipe covering on piping throughout the many ships that you worked on the condition of the pipe covering?
>
> A: **The condition on ships was always wonderful**. There was a cast and everything was painted.
>
> Q: Okay. Did you ever observe these miles of pipe covering to be dusty or flaky?
>
> A: **No**.[104]

Mr. Golini also testified that he did not work around others who manipulated pipe covering and insulation and that he was not even sure that the pipe covering he encountered contained asbestos.[105] Mr. Turlik explained:

> He's saying he doesn't know if these products contained asbestos. So what [Garlock] need[s] to do is determine who the manufacturer of the product is and, through that information, show that it's an asbestos-containing product.[106]

On this this record, Garlock settled the case for $250,000 in 2010.[107]

Documents uncovered in these cases, however, revealed that the Shein Law Center withheld material evidence of Mr. Golini's exposures to other products. Only months after

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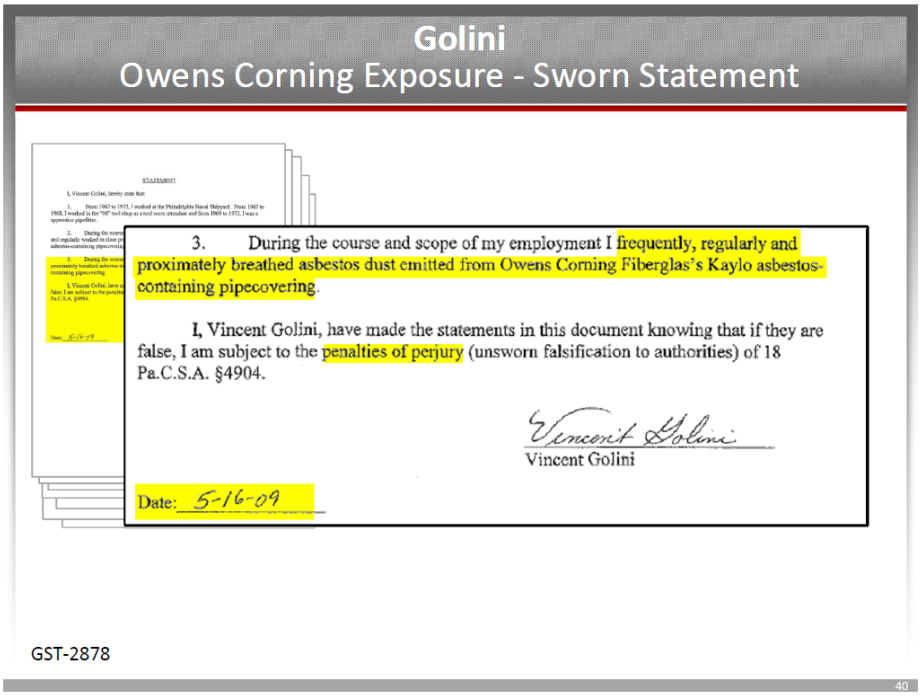
[102] Tr. 2282:5-14 (Turlik); 8/10/09 Golini Dep. at 32-34 (GST-2842).
[103] Tr. 2280:11-12 (Turlik).
[104] 8/12/09 Golini Dep. at 148:20-149:10 (GST-2841) (emphasis added); *see also* Turlik Demonstrative Slides at 16 (GST-8000).
[105] Tr. 2281:4-11 (Turlik).
[106] Tr. 2281:14-18 (Turlik).
[107] Tr. 2282:23-2283:7 (Turlik); *see also* Turlik Demonstrative Slides at 54 (GST-8000) (noting that Garlock settled the *Golini*, *Massinger* and *Brennan* cases in a group of ten total cases); *see also* Shein Dep. at 42:12-18.

Garlock resolved the Golini case, the Shein firm filed Trust claims based on the very exposures (e.g., Owens-Corning, Fibreboard, Armstrong) that Mr. Golini denied. An excerpt from Mr. Golini's undisclosed Owens Corning sworn statement is reproduced below.[108]

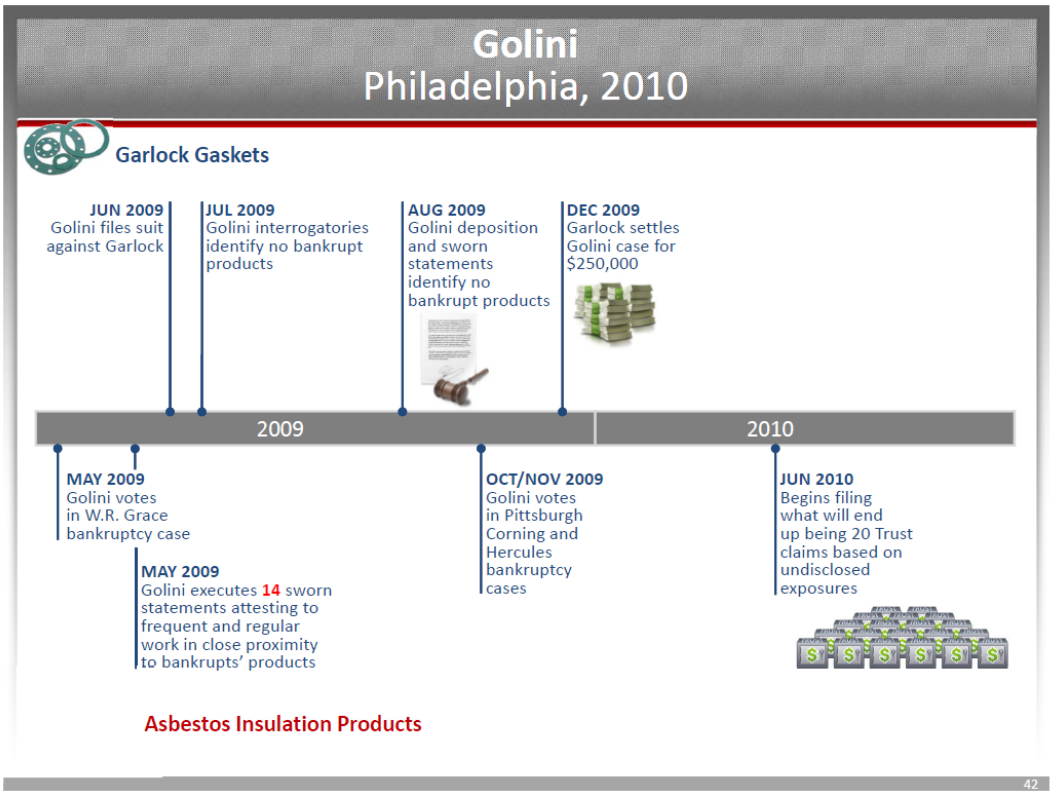


In total, the Shein firm made claims against 20 different Trusts based on exposures to bankrupt companies' products that Mr. Golini failed to disclose or denied in the tort case against Garlock. In addition, the Shein firm cast ballots in reorganization cases of five other defendants based on exposures denied or not identified.

Fourteen of the claims were based on sworn statements drafted by the Shein firm and executed by Mr. Golini himself. In those statements, he attested to his personal knowledge that he "frequently, regularly, and proximately breathed asbestos dust" from multitudes of other companies' products. Those sworn statements contradicted his denials in discovery. Particularly troubling was the fact that those statements were made weeks and months before the Shein firm served Mr. Golini's discovery responses and well before Mr. Golini's deposition. In fact, at Mr.

[108] Turlik Demonstrative Slides at 22 (GST-8000).

Golini's *de benne esse* deposition, the Shein firm elicited testimony from Mr. Golini that squarely contradicted the sworn testimony the firm held in its files.[109]



> Had this evidence been disclosed, it would have altered Garlock's defense of the case:
>
> [I]f you look at the volume of these exposures as compared to what he testified about, that's huge. That really is important to making our defense work both at low-dose and also in terms of fiber type.
>
> It would have lessened our trial risk. It would have given a case where we would be confident that we had our whole defense again, because we would have had these exposures that we didn't know about at the time we settled the case.[110]

It also would have reduced Garlock's defense costs:

> [This information] would have [impacted Garlock's costs], because we wouldn't have to spend all that money trying to find alternative sources for this identification. It was there and we didn't have it.[111]

[109] Turlik Demonstrative Slides at 24 (GST-8000).
[110] Tr. 2286:14-24 (Turlik).
[111] Tr. 2287:2-5 (Turlik).

The claims of other plaintiffs represented by the Shein firm, Bernard Massinger and John Brennan, settled in the same group as Golini. Mr. Turlik testified that those cases contained similar patterns of concealment that materially impacted how Garlock resolved those cases.[112]

Peter Homa, Belluck & Fox, New York City, 2008-09, $250,000 Settlement

Mr. Turlik also described the Peter Homa case, a case Garlock settled after eighteen days of trial in New York City. The Belluck & Fox firm represented Mr. Homa. Like Mr. Golini, Mr. Homa did not identify any bankrupt companies in response to interrogatories mandated by the New York City asbestos case management order. At deposition, Mr. Homa identified three bankrupt companies: Worthington (pumps), Flexitallic (gaskets), and Babcock & Wilcox (boilers), but did not identify companies who were responsible for insulation. When asked, he denied knowledge of contact with more than a dozen bankrupt companies' products, including companies responsible for asbestos insulation products such as Armstrong, Eagle-Picher, Owens Corning, and Pacor.[113] During the trial, his lawyers continued to maintain that there was no evidence of exposure to amphibole insulation.

The New York City case management order ("NYC CMO") that governed Mr. Homa's case required that plaintiffs on the *in extremis* docket (like Mr. Homa) file and disclose any Trust claim they intend to file at least 90 days before trial:[114]

> Any plaintiff who intends to file a proof of claim form with any bankrupt entity or trust shall do so no later than ten (10) days after plaintiff's case is designated in a FIFO Trial Cluster, except in the in extremis cases in which the proof of claim form shall be filed no later than ninety (90) days before trial.

[112] Tr. 2287:6-2293:9, 2300:16-2304:10 (Turlik) (discussing Massinger and Brennan cases).
[113] Tr. 2305:21-2306:5; 2306:16-21 (Turlik); *see also* 6/17/08 Homa Dep. at 57-58 (Babcock & Wilcox) (GST-3614); 6/18/08 Homa Dep. at 260, 288-89 (GST-2897) (disclaiming knowledge of Eagle Picher, Johns-Manville, Keene, Owens Corning, Philip Carey, Pittsburgh Corning, Raybestos, Raymark, USG, National Gypsum, Combustion Engineering); 10/2/08 Homa Dep. at 50-51 (GST-3613) (Flexitallic); 5/7/09 Trial Tr. at 961-63, 969-70 (GST-3621) (reading into evidence Homa deposition disclaiming knowledge of Eagle Picher, Johns-Manville, Keene, Owens Corning, Philip Carey, Pittsburgh Corning, Raybestos, Raymark, USG, National Gypsum, and Combustion Engineering).
[114] 2307:1-4 (Turlik) (testifying to requirements of NYC CMO).

NYC Amended Case Management Order (Feb. 19, 2003) (GST-0401).

Homa identified no Trust claims. The Belluck & Fox firm's 30(b)(6) designee, Joe Belluck, conceded that the NYC CMO applied to the case,[115] and that, as the Homa case approached trial, Garlock pressed his firm about whether Mr. Homa intended to file any bankruptcy Trust claims and disclose them:

> I know that at some point in April of 2009, Ted Eder, who was a lawyer for Segal, McCambridge, contacted Jordan Fox, and asked if any trust claims had been filed on behalf of Mr. Homa, and was advised that there were none that we were aware of.[116]

Garlock thus went to trial on the basis that there was no evidence to support Trust claims.[117]

As noted above, Garlock tried to use ship records and expert testimony to demonstrate that Mr. Homa had exposure to friable, amphibole insulation.[118] Mr. Homa and his lawyers resisted. For instance, Richard Hatfield, the industrial hygiene witness the plaintiff called at trial, in the face of these records testified that because Mr. Homa said he had not had contact with pipe covering or block material, he would conclude that Mr. Homa was not exposed to those products.[119]

Documents discovered from the Homa case reveal that Belluck & Fox concealed Mr. Homa's Trust claims. Notwithstanding the NYC CMO and Belluck & Fox's assurances, Mr. Homa's lawyers filed 23 Trust claims on Mr. Homa's behalf after settlement. Eight of those claims were filed within 24 hours of Belluck & Fox reaching settlement terms with Garlock at trial. Eleven claims relied on exposures in jobs where Mr. Homa denied he was exposed to asbestos. Mr. Homa also filed an additional Trust claim against Johns Manville almost a year before trial but Belluck & Fox never disclosed it.

[115] Belluck Dep. at 81:18-22, 82:13-17.
[116] Belluck Dep. at 151:19-24.
[117] Tr. 2308:14-16 (Turlik).
[118] Tr. 2308:20-25 (Turlik).
[119] Tr. 2309:1-24 (Turlik).

Many of the Trust claims identified exposure to products Mr. Homa had denied. Claims against Eagle-Picher, Owens Corning, and Pacor included information about exposures that Mr. Homa was asked about at his deposition and which Mr. Homa denied.[120]

The David Law firm was co-counsel with Belluck & Fox and filed Mr. Homa's Trust claims. Mr. Cooper explained that the timing of the filing of Trust claims was based on direction from Belluck & Fox:

> Q. The -- we talked earlier generally about the date in terms of approach as to when to file trust claims. Is this an instance where a decision was made to delay the filing of claims because it was in the client's best interest?
>
> A. Yes, that's correct.
>
> Q. Did Belluck & Fox have any input into that decision?
>
> A. Yes.[121]

Like the Golini case, this information would have altered how Garlock approached the case:

> Instead of having our efforts to show exposure to thermal insulation products being shot down, as it were, we would have had this evidence and it would have made a much stronger case. It would have reduced our risk because we would have been able to show those exposures.[122]

Mr. Turlik described other Belluck & Fox cases, those of Raymond Beltrami and Robert Flynn, where dozens or scores of Trust claims were filed after settlement with Garlock. He further explained why non-disclosure of Trust claims was important to Garlock:

> A . . . I did want to point out why [disclosure of trust claims is] so important --
>
> Q. Okay. Please do.
>
> A. -- especially in a state like New York. Your Honor, the more exposures we get, the more identification we get, the better our defenses are, especially

[120] Tr. 2313:17-2314:19 (Turlik) (comparing trust claims to disclosures).
[121] Cooper Dep. at 75:9-17.
[122] Tr. 2315:1-6 (Turlik).

> the low-dose defense because it shows the volume of exposure. But in New York we also are allowed to put the bankrupts on the verdict form. So what happens is our share of the verdict is elevated, and that is something that we're aware of when we settled these cases. Both that we—that our low-dose defenses diminished, our Chrysotile defense is somewhat diminished, and also that the verdict form itself is going to be limited and, thus, expose us to a potentially higher verdict. That causes a higher trial risk and a higher settlement value.[123]

Robert Treggett, Waters & Kraus, Los Angeles, 2004, $9 million settlement of verdict

Mr. Glaspy and Mr. Magee both testified about the Robert Treggett case, the case that was the largest verdict Garlock ever suffered. The jury awarded $9 million in compensatory damages from Garlock and $15 million in punitive damages. Garlock settled the case on appeal, agreeing to pay the amount of the compensatory award.

Ron Eddins, then of Waters & Kraus, represented the plaintiff, a former navy machinist mate stationed on board a nuclear submarine. The 2004 case was one of the first cases where Garlock's lawyers were forced to deal with a plaintiff who did not acknowledge amphibole insulation exposures that were obvious based on his occupational history. For instance, in his trial, Mr. Treggett did not identify any specific insulation products that he was exposed to. He asserted that the largest proportion of his routine work was with gaskets, where he spent nearly three-fourths (70%) of his time, compared to only 3% of time with insulation that blanketed the spaces and equipment he worked on. He testified that the insulation products he encountered were primarily chrysotile blankets, not dangerous amosite pipe covering.

Using Navy records and the testimony of Commander Delaney and Dr. Sawyer, Garlock tried to show that Mr. Treggett was exposed to amphibole products, including what the Committee calls "the most poisonous asbestos product of all"[124]—Unibestos-brand insulation from Pittsburgh Corning. But Mr. Treggett would not acknowledge exposure. In fact, Mr. Eddins

[123] Tr. 2318:5-20 (Turlik).
[124] Tr. 2487:18-19 (examination by T. Swett).

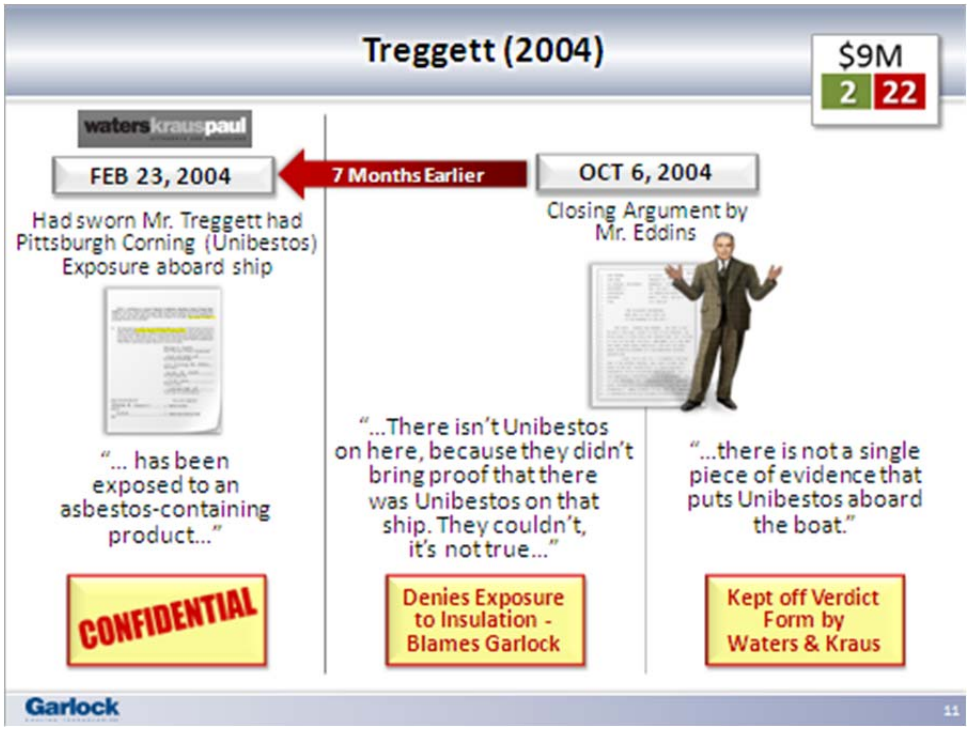
fought to deny Garlock from assigning blame to Pittsburgh Corning, persuading the judge not to include Pittsburgh Corning on the jury form. He even chastised Garlock before the jury because Garlock tried to show Unibestos exposure:

- "You see, they sought to talk about Unibestos throughout the whole trial over and over and over. It's so speculative, they're not listed here [on the jury form]."[125]
- "Your duty is to evaluate the defendants in this case and the others listed and decide among those the responsibility for causing [Mr. Treggett's] Mesothelioma 100 Percent. 100 Percent of it is as to them. No blankets, no pads, no Unibestos, no amosite."[126]
- "There is not a single piece of evidence that puts Unibestos aboard the boat."[127]
- "There isn't Unibestos [on the jury form] because they didn't bring proof that there was Unibestos on that ship. They couldn't. It's not true . . . . They thought we'll try to prove this amosite thing and say it's all that amosite, and they didn't do it, and they couldn't do it, because it's not true."[128]

Discovery in these cases, however, showed Waters & Kraus's representation of Mr. Treggett to be a calculated fraud. After the trial, Waters & Kraus filed fourteen Trust claims and cast nine ballots based on exposure evidence Waters & Kraus denied existed. Six claims arose from Mr. Treggett's work at the Mare Island Shipyard in jobs where he claimed he was never exposed to asbestos. Many of the Trusts were responsible for amosite insulation, including Armstrong, Fibreboard, Owens Corning, and Western Asbestos, Waters & Kraus indicated he never touched.[129] In all, the Waters & Kraus firm failed to disclose exposures to 22 products of bankrupt companies in the case against Garlock.

[125] 10/6/04 Treggett Trial Tr. at 5743 (GST-5440).
[126] 10/6/04 Treggett Trial Tr. at 5743 (GST-5440).
[127] 10/6/04 Treggett Trial Tr. at 5177, 5184-86 (GST-5440).
[128] 10/8/04 Treggett Trial Tr. at 5742-44 (GST-5440).
[129] Treggett Lummus Trust Claim at Waters 02350 (GST-5478); Treggett AWI Trust Claim at Waters 02423 (GST-5480); Treggett Combustion Trust Claim at Waters 2520 (GST-5483); Treggett FB Trust Claim at Waters 02561 (GST-5485); Treggett OC Trust Claim at Waters 02685 (GST-5489); Treggett Western Trust Claim at Waters 02826 (GST-5493).

An especially egregious aspect of Waters & Kraus' conduct in the Treggett case was the fact that seven months before trial, Waters & Kraus cast a ballot on Mr. Treggett's behalf in the Pittsburgh Corning bankruptcy case certifying under penalty of perjury that Mr. Treggett had Unibestos exposure and then, at trial, represented that there was "no evidence" that Mr. Treggett was exposed to Unibestos.[130]



Mr. Glaspy testified at trial that the information Garlock obtained in this case would have changed how he handled the *Treggett* case.[131] Moreover, he said, this information would have changed the outcome at trial:

> I firmly believe we would have defensed this case like we defensed other cases with similar exposure.
>
> These exposures [with the exposure evidence obtained through this case] are exactly what you saw in the prior cases. And you'd have this information in answers to interrogatories, at deposition, the information coming from the

[130] Treggett 2004 PCC Ballot at GST-EST-0555991 (GST-54455); Magee Demonstrative Slides at 11 (GST-8018). The short form citations for ballots, Trust claims, and 2019 statements are located in the Appendix *infra*.
[131] Tr. 4583:19-23 (Glaspy).

> plaintiff's attorneys or the plaintiff himself. This same information was there and used [in other cases] very successfully in our defense.[132]

Mr. Magee testified how this information would have altered the course of that case:

> [I]t obviously would have made a big difference in the evidence. Mr. Eddins certainly could not have testified to the jury that Unibestos was not on the ship if the Court knew and if the jury was allowed to know that just seven months earlier there had been a ballot filed in the Pittsburgh Corning case on behalf of Mr. Treggett[.]
>
> If the jury had been permitted to know that Mr. Treggett was going to file trust claims against lots of insulation defendants, then all of a sudden it wouldn't have been Garlock -- you saw Mr. Eddins' words about how Garlock's the one trying to point to amosite; Garlock's the one trying to blame somebody else. If that had been the case, the jury would have known that Mr. Treggett acknowledged [a]mphibole insulation exposure and it wouldn't have been just Garlock trying to demonstrate it. It would have been coming from the claimant's mouth himself.[133]

Without the Treggett verdict, Garlock's settlement history would have been drastically different. Treggett, in Garlock's view, might have had the most influence on settlement amounts of any case in its history. Mr. Magee called it the "driver case of all driver cases."[134] It influenced scores of high-dollar settlements for years, particularly those for plaintiffs represented by Waters & Kraus and Simon Eddins, two firms linked to Treggett and two firms whose clients routinely presented discovery missing the core exposures that allowed Garlock to make its case. 3090:8-11 (Magee).

Howard Ornstein, Simon Greenstone, Los Angeles, 2009, $450,000 Settlement

As noted above, Mr. Glaspy identified the Howard Ornstein case as an example of the kind of case, after the Bankruptcy Wave, where a plaintiff with an occupational background that should indicate exposure to amphibole insulating products failed to identify those products in

[132] Tr. 4584:1-2, 7-12 (Glaspy).
[133] Tr. 3077:15-3078:7 (Magee).
[134] Tr. 3090:11-13 (Magee).

discovery.[135] Notwithstanding this background, Mr. Ornstein, a navy electronics technician stationed aboard ships, testified that *he never saw anyone installing or removing pipe insulation* during the overhaul of the USS Estes[136] and that *he never saw a boiler* while he was in the Navy.

Indeed, defense counsel covered these points extensively at deposition. The following extended quotation of his testimony emphasizes how thoroughly defendants questioned him whether he was exposed to asbestos in the engine room or boiler room, or around boilers:[137]

> Q. When you went on board ship, do you have an understanding that the Estes had a boiler?
> A. Yes.
> Q. Did you ever see that boiler?
> A. No.[138]
>
> . . .
>
> Q. During your time on the Estes, did you ever have any occasion to work in the engine room or the fire room or boiler room?
> A. No, I didn't work in any of that area.
> Q. Do you have any reason to believe you may have been exposed to any asbestos in the engine room or the fire room or the boiler room on the Estes?
> A. No.[139]
>
> . . .
>
> Q. I believe you told us yesterday that you never went into the engine room on board the Estes?
> A. Correct.
> Q. You never went into the boiler room?
> A. Correct.[140]
>
> . . .
> Q. Okay. You mentioned previously that when you were on the Estes, you never went into the boiler room, the engine room, or the fire rooms. I understand that, and my question may seem silly, but I have to ask it anyway. To the best of your

[135] *See* discussion *supra* at I.C. (comparing Lunsford case to Ornstein case). Tr. 4573:5-4575:1 (Glaspy) (describing denial of boiler exposure).
[136] 6/3/08 Ornstein Dep. at 228-30, 237 (GST-3832); 6/5/08 Ornstein Dep. at 525-27 (GST-3834).
[137] Tr. 4573:5-4575:1 (Glaspy) (describing denial of boiler exposure); Glaspy Demonstrative Slides at 18-23 (GST-8024).
[138] 6/2/08 Ornstein Dep. at 39 (GST-3831).
[139] 6/3/08 Ornstein Dep. at 107 (GST-3832).
[140] 6/4/08 Ornstein Dep. at 321-22 (GST-3833).

knowledge, did you ever work with or around any type of boilers when you were on the Estes?

A. No.[141]

. . .

Q. And if I understand correctly, you've never been around the boilers; right?

A. Right.[142]

Garlock settled the Ornstein case for $450,000. Thereafter, Simon Greenstone filed eleven Trust claims on Mr. Ornstein's behalf based on exposures never identified in Mr. Ornstein's tort case. Seven of the claims were based on declarations attesting to his personal knowledge of exposures arising from when he "would remove and replace insulation" such as Armstrong 85% Magnesia Pipe Covering and Block, Eagle Picher 85% Magnesia Pipe Covering, Keene Pipe Covering, Pabco 85% Magnesia Pipe Covering, and Kaylo Pipe Covering.[143]

Other sworn statements attested, specifically, to boiler room exposure, namely exposure to "Combustion Engineering Boilers" while "standing fire watch during the overhaul of the USS Estes"[144] that flew in the face of the repeated denials that Mr. Ornstein made in his deposition.

Mr. Glaspy explained that, had he had access to this evidence when the case was pending, "I never would have recommended my client settle this case for $450,000, far from it."[145] Further:

> [This information] would have changed the way I evaluated the Ornstein case. [Garlock] generally relied on my expert opinion for California cases. And I would

[141] 6/4/08 Ornstein Dep. at 363-64 (GST-3833).
[142] 6/5/08 Ornstein Dep. at 527 (GST-3834).
[143] Declaration of Howard Ornstein (June 18, 2009), at Simon 28055 (GST-3873) (Armstrong 85% Magnesia Pipe Covering and Block and Armstrong Hi-Temp Pipe Covering); Declaration of Howard Ornstein (Mar. 12, 2009), at Simon 28140 (GST-3876) (same); Declaration of Howard Ornstein (March 12, 2009), at Simon 28372 (GST-3880) (Worthington Pumps); Declaration of Howard Ornstein (Mar. 12, 2009), at Simon 28226 (GST-3878) (Combustion Boilers); Declaration of Howard Ornstein (Mar. 12, 2009), at Simon 28488 (GST-3882) (Eagle Picher 85% Magnesia Pipe Covering); Declaration of Howard Ornstein (Mar. 12, 2009), at Simon 28674 (GST-3885) (HKP Asbestos Cloth); Declaration of Howard Ornstein (Mar. 12, 2009), at Simon 28767 (GST-3888) (Keene Pipe Covering); Declaration of Howard Ornstein (Mar. 12, 2009), at Simon 28863 (GST-3890) (Pabco 85% Magnesia Pipe Covering and Kaylo Pipe Covering).
[144] Declaration of Howard Ornstein (Mar. 12, 2009) at Simon 28226 (GST-3878).
[145] Tr. 4562:7-8 (Glaspy).

have recommended the same numbers we used to pay in 1990s. Because nothing has changed, we're back where we were with this information.[146]

Oscar Torres, Williams Kherker, Houston, Texas, $1.3 million verdict (on appeal)

Mr. Torres obtained the only significant mesothelioma verdict against Garlock between 2006 and its bankruptcy petition in 2010 that has not yet been reversed on appeal: 45% of a $3 million compensatory damages verdict, or $1.35 million.[147] The gist of Mr. Torres' case was his contention that "his only asbestos product exposure was to Garlock crocidolite gaskets."[148] Mr. Torres, represented by the Williams Kherker firm, in fact, identified no bankrupt products to which he was exposed in his response to Texas' mandated asbestos interrogatories.[149]

In particular, he did not identify any Trust claims in response to the standard Texas interrogatory asking about any Trust claim that "was or will be made," and did not produce any Trust claim forms in response to the standard request for production requiring production of such claim forms. In fact, his specific response was that this request was "not applicable" and that there were no Trust claims at that time.[150] Through the entire course of the case, including trial, Mr. Torres continued to maintain that the only asbestos-containing products he handled directly were Garlock crocidolite gaskets.[151] When asked, he denied exposure to other products. Notably, he specifically denied knowledge of the name "Babcock & Wilcox."[152]

At trial, Garlock attempted to prove that Mr. Torres' mesothelioma was caused not by Garlock gaskets but by insulation products, including Kaylo pipe covering manufactured by

[146] Tr. 4562:16-20 (Glaspy).
[147] 3/5/10 Trial Tr. at 8 (GST-4861).
[148] Tr. 3082:19-20 (Magee).
[149] Plaintiffs' Seventh Supplemental Responses to Master Interrogatories, Requests for Production and Disclosures at 9-10, 13-14, 21-23 (Feb. 15, 2010) (GST-4926).
[150] *Id*. at 13-14, 48-49.
[151] 2/17/10 Trial Tr. at 45 (plaintiff opening) (GST-4850) ("The only asbestos product Oscar actually worked with himself was the Garlock gaskets."); 3/4/10 Trial Tr. at 69-70 (GST-4860) ("The reason why Garlock is more of a cause is because the only product that Oscar used hands-on was Garlock . . . .").
[152] 7/16/09 Torres Dep. at 91:5-7 (GST-4639).

Owens Corning.[153] In the absence of identification of insulation products by Mr. Torres or his attorneys, Garlock tried to prove Mr. Torres' exposure to Kaylo in its cross-examination of Dr. Lemen, one of Mr. Torres' experts.[154] Mr. Torres' attorneys later argued that there was no evidence or legally insufficient evidence that Owens Corning and Johns Manville proximately caused Mr. Torres' mesothelioma.[155] Over the objection of Mr. Torres' attorneys, the court permitted Owens Corning and Johns-Manville to be placed on the verdict form.[156] Then, in closing arguments, Mr. Torres' attorneys vigorously denied he was exposed to Owens Corning insulation.[157] The jury assigned no fault to Owens Corning or Johns-Manville.[158]

Discovery in this case revealed multiple contradictions between Williams Kherker and Mr. Torres' representations to Garlock and filings they made to Trusts. First, Garlock discovered in this case that, one day prior to giving deposition testimony where he denied knowledge of "Babcock & Wilcox," Williams Kherker filed a claim against the Babcock & Wilcox Trust that was paid.[159] The claim was never disclosed to Garlock, in violation of Texas discovery rules.[160] Mr. Torres' trial attorney, at his deposition in this bankruptcy case, claimed he did not know about the Babcock & Wilcox claim during the tort case, but he admitted that the attorney who filed the claim reported directly to him.[161] Also, after the trial concluded, Mr. Torres filed a claim with the Owens Corning Trust despite his attorney's representation during trial that he was not exposed to Owens Corning products (this claim too was eventually paid).[162]

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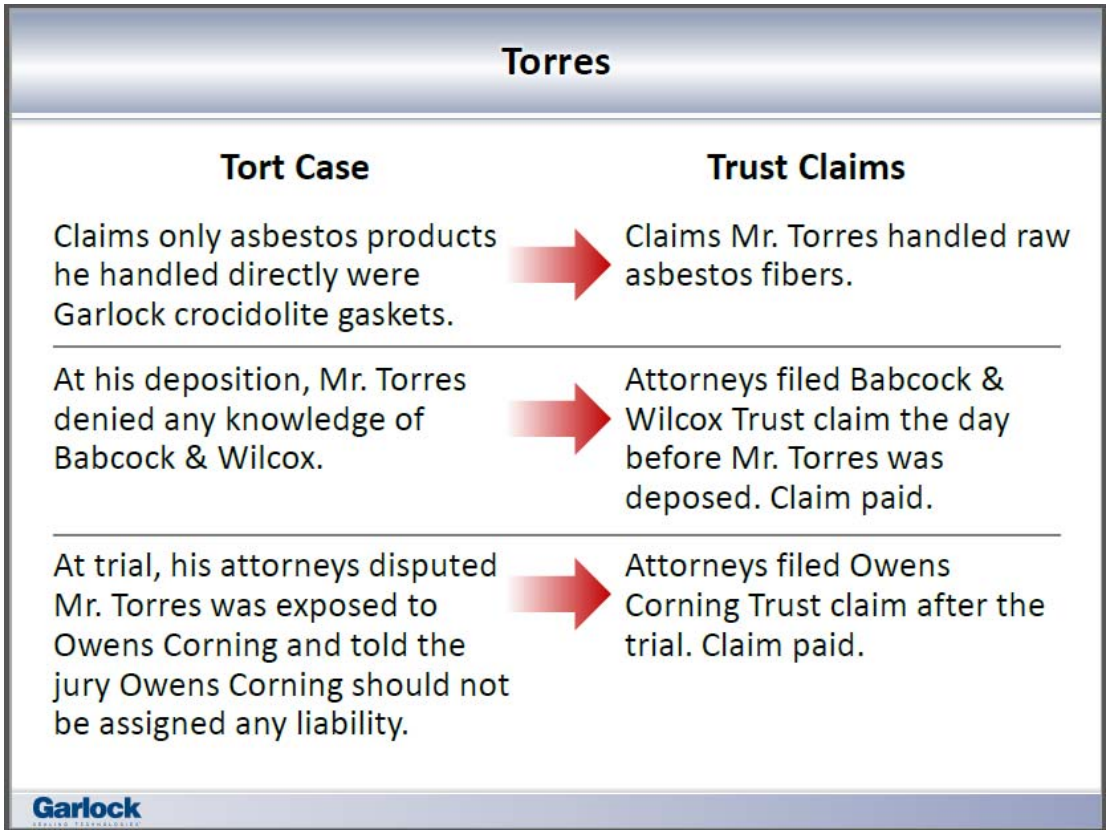
[153] *See, e.g.*, 3/4/10 Trial Tr. at 105, 109, 113, 120, 128 (closing argument) (GST-4860).
[154] 2/19/10 Trial Tr. at 82-95 (GST-4852).
[155] 3/4/10 Trial Tr. at 21 (GST-4860).
[156] 3/3/10 Trial Tr. at 253-54 (GST-4859); 3/4/10 Trial Tr. at 21-22 (GST-4860).
[157] 3/4/10 Trial Tr. at 56, 58 (GST-4860).
[158] 3/5/10 Trial Tr. at 8 (GST-4861).
[159] Torres B&W Trust Claim at WK0001-0009 (GST-4927).
[160] 1/11/13 Chandler Dep. at 52:9-53:1.
[161] *Id.*
[162] Torres OC Trust Claim at WK0086-0095 (GST-4929); Magee Demonstrative Slides at 42 (GST-8017).



Most surprising of all, in both the Babcock & Wilcox Trust claim and the Owens Corning Trust claim, Mr. Torres represented that he "handled raw asbestos fibers on a regular basis" and "fabricated asbestos-containing products such that [he] in the fabrication process was exposed on a regular basis to raw asbestos fibers."[163] No handling of raw asbestos was disclosed in the tort case.[164] To the contrary, Mr. Torres and his attorneys claimed repeatedly that the only asbestos products Mr. Torres ever handled were Garlock crocidolite gaskets, a finished product that did not involve "raw asbestos fibers."[165]

[163] Torres B&W Trust Claim at WK0006 (GST-4927); Torres OC Trust Claim at WK0092 (GST-4929).
[164] When confronted with these statements in the Trust claims, Mr. Torres' attorney claimed that the "raw asbestos fibers" referred to asbestos from Garlock's gaskets—a finished product. 1/11/13 Chandler Dep. at 63:3-64:2.
[165] *See* 3/4/10 Trial Tr. at 69-70 (GST-4860) ("The reason why Garlock is more of a cause is because the only product that Oscar used hands-on was Garlock . . . .").

3. The RFA-1 Claims listing shows widespread practices of omitting exposure in significant cases

The cases identified as RFA-1 Claims were cases identified by Debtors' counsel in response to requests for admissions from the Committee. Cases listed are ones that reflect circumstances where plaintiffs or plaintiffs' counsel omitted to disclose evidence of exposure to other companies' products.

Cases were identified based on an examination by Bates White that compared exposure evidence disclosed in discovery to Garlock against claims plaintiffs made to DCPF Trusts and in voting confirmation ballots in bankruptcy reorganizations.[166] Cases listed were additionally vetted by Debtors' counsel, Robinson Bradshaw & Hinson. That process led to the identification of 205 mesothelioma claims that reflected instances of plaintiffs' omission of evidence.[167] Comparison of tort discovery to limited information about plaintiffs' bankruptcy claiming activity showed an average of 8.9 omissions in each case, including 4.4 omissions of exposure to insulation company products. Because Garlock only had access to claims made to DCPF Trusts[168] and to bankruptcy ballots Garlock was able to obtain for several bankruptcies, these averages do not consider every Trust claim filed and every confirmation ballot cast.

Mr. Magee explained at trial that in the time periods relied on by Drs. Rabinovitz and Peterson, Garlock resolved only 161 mesothelioma claims for payments more than $250,000.[169] The RFA-1 Claims identified 72 of those claims as instances where plaintiffs' discovery contradicted their bankruptcy claim.[170] Mr. Magee further explained that these practices likely

[166] Tr. 3063:21-24 (Magee).
[167] A total of 210 cases appeared on the listing but 5 of those cases were not mesothelioma claims or not closed claims. *See* Tr. 2595:25-2596:8 (Magee).
[168] Tr. 3063:15-3064:4 (Magee); Tr. 2798:10-14 (Bates).
[169] Tr. 3063:4-14 (Magee).
[170] Tr. 3063:15-3064:4 (Magee).

extend to more of the 161 cases than those listed because Garlock's review was not exhaustive and did not consider many of the cases in that category.[171]

The extensive nature of the conduct reflected by this analysis was significant. Mr. Magee expressed the following about the results of the analysis:

> Well, I'll acknowledge I was a little surprised. You know, we have suspected that there were omissions and that we knew what was going on in driver cases, but I would not have guessed that it was as extensive as it is as portrayed by this analysis.[172]

Consistent with what is depicted by the RFA-1 Cases, both Mr. Turlik and Mr. Glaspy in their testimony made clear that circumstances depicted in the Designated Plaintiffs were not unusual. Although those circumstances were not universal, firms that sought to leverage the highest settlements routinely presented plaintiffs that did not identify exposures to bankrupt companies' products.

This problem was not one unique to Garlock. At trial, Professor Lester Brickman testified about several exemplary rulings from tribunals who sanctioned plaintiffs for their failure to produce bankruptcy Trust claim information.[173] In each instance, the trial court's ruling hinged on the materiality of the evidence to defendants. A prime example that Professor Brickman detailed was the ruling in *Montgomery v. American Steel & Wire* (Del. Sup. Ct. Castle County) (Nov. 7, 2011) by Judge Peggy A. Ableman, the Delaware judge before whom all pre-trial matters for asbestos cases in Delaware were heard. In that case, plaintiff's counsel told defendants that the plaintiff had not made any bankruptcy submissions, but two weeks before trial, disclosed that two bankruptcy Trusts had paid settlements to the plaintiff. Defendants

[171] Tr. 3064:19-3065:2 (Magee). At trial, Garlock presented a document that detailed the precise number of omissions identified through this review for each claim. *See* Omissions in RFA-1 Cases Based on DCPF and Ballot Data Only (GST-8001) (described at Tr. 3066:3-3067:3 (Magee)).
[172] Tr. 3067:4-3067:10 (Magee).
[173] Tr. 1189:11-1193:13 (Brickman).

pressed plaintiff for more information and learned that the plaintiff had, in fact, made claims to 20 different Trusts—none of them disclosed to defendants. Judge Ableman held that denying defendants the benefit of this evidence severely prejudiced the defendants:

> This is dishonesty at its highest level. This is a guy who got checks and never reported those to you. It affected their [defendants'] discovery. It affected their ability to prepare their case.

Montgomery v. Am. Steel & Wire (Del. Sup. Ct. Castle County, Nov. 7, 2011) at 3-4 (GST-1148). Judge Ableman continued:

> This [omission to disclose trust claims] deals with the verdict sheet. It deals with the way they present their defense. It deals with what information they have. It deals with how they cross-examine the witnesses. They have not been able to do any cross-examination or any discovery on the other aspects of exposure that are listed in this letter because they were not aware that there were these claims that were made.

Id. at 4. And she recognized the serious abusiveness and widespread nature of the behavior:

> This is really seriously egregiously bad behavior. This is misrepresenting. This is trying to defraud. I don't like that in this litigation. And it happens a lot. This is an example of the games that are being played. And I don't think that this case warrants anything but dismissal based on what your client has done.

Id. at 7-8. Mr. Brickman's testimony and report described and explained other cases where courts found that the omission of this evidence was central to a defendant's defense and, accordingly, sanctioned plaintiffs and their lawyers for their non-disclosure.[174]

4. Courts and legislatures have recognized that exposure evidence—including that supporting Trust claims—should be disclosed

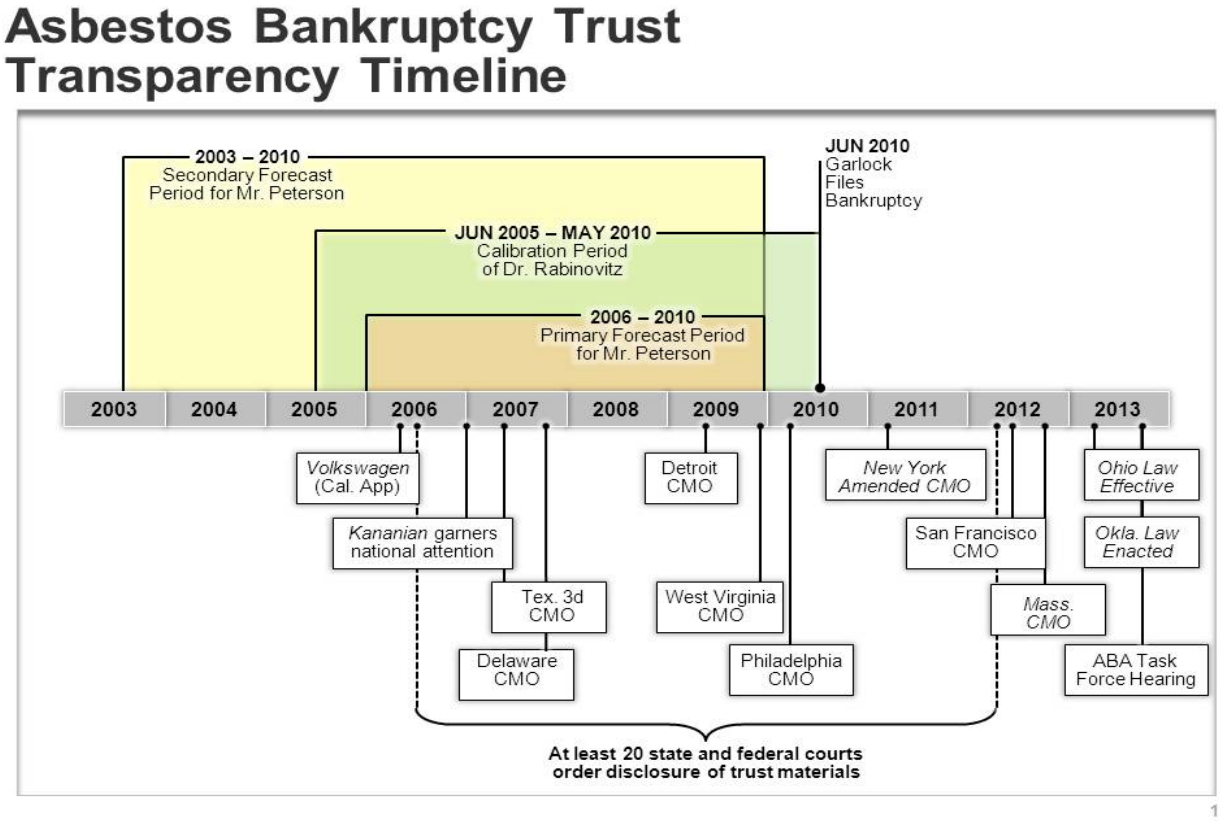
Courts and lawmakers have increasingly recognized the critical nature of this kind of exposure evidence, requiring its disclosure in standard interrogatories, court decisions, case management orders, and legislation that became effective before and after Garlock sought

[174] Tr. 1189:11-1193:13 (Brickman); Report of Lester Brickman at 47-57 (GST-0969); *Barnes & Crisafi v. Ga. Pac.*, No. MID-L-5018-08 (AS) (N.J. Super. Ct. N.J. Middlesex County June 12, 2012) (GST-1150); *Brassfield v. Alcoa, Inc.* (Tex. Dist. Ct. Harris County Nov. 22, 2006) (GST-0660); *Stoeckler v. Am. Oil Co.* (Tex. Dist. Ct. Angelina County Jan. 28, 2004) (GST-0661); *Dunford v. Honeywell Corp.* (Va. Cir. Ct. Loudoun County Dec. 10, 2003).

chapter 11 protection. For instance, the Court heard testimony from Messrs. Turlik and Glaspy about specific cases Garlock resolved where, as a matter of standing orders, plaintiffs must identify all of their known exposures to asbestos products, including exposures to parties who are not joined—bankrupt defendants in particular.[175]

The material nature of this evidence has led courts and legislatures, in the latter half of the first decade of the 2000s, to begin to take steps to ensure defendants have the benefit of this information. Discovery decisions have been made, case management orders have been entered, and legislation has been passed with increasing momentum through the end of that decade and after Garlock filed for chapter 11 relief. (Debtors have provided a listing of these decisions on Exhibit A to this brief.) The chart below depicts the growing number of jurisdictions that have recognized the importance of evidence of exposures to bankrupt companies' products and that have compelled production through discovery decisions or case management orders. Some jurisdictions (New York City, West Virginia, Massachusetts, Ohio, Oklahoma), by judicial rule or legislation, go further and require plaintiffs to identify information that would support Trust claims so that information is available to defendants before and at trial. To underscore the trend of courts calling for transparency, the American Bar Association recently chartered a task force on asbestos litigation and bankruptcy Trusts that is examining the issue of bankruptcy Trust claim disclosure.[176]

[175] *See* Tr. 2305:2-18 (Turlik) (testifying that the New York City CMO imposes standard interrogatories requiring identification of exposures to bankrupt companies' products); Tr. 4538:24-4539:3 (Glaspy) (testifying about standard Los Angeles County interrogatories requiring identification of products from non-named defendants).
[176] *See* Asbestos Task Force, *Task Force Overview*, at http://www.americanbar.org/groups/tort_trial_insurance_practice/asbestos_task_force.html.



II. Garlock's past settlements are not a measure of the expected allowed amount of mesothelioma claims

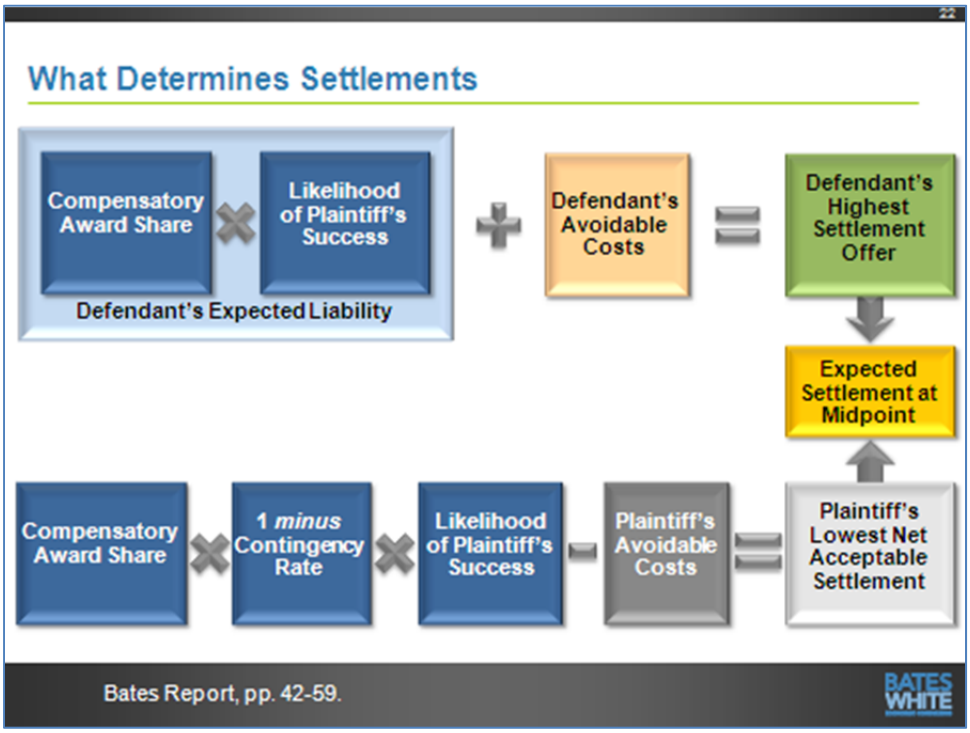
The Court has held that the probative value of Debtors' settlements at estimation is a matter of evidence, not a matter of law. Estimation Order ¶ 19.[177] The evidence at trial showed that Garlock's past settlements of mesothelioma cases are not a measure of the allowed amount of mesothelioma claims—i.e., the results one would expect if those claims were allowed. *See Dow Corning*, 211 B.R. at 566; Estimation Order ¶¶ 9, 11.

[177] Debtors have objected on a number of occasions to the admission of settlements to estimate or otherwise determine the validity and amount of present and future asbestos claims asserted against them, on the basis of, inter alia, Federal Rules of Evidence 401 and 408. *See, e.g.*, Renewed Motion of Debtors to Exclude Evidence of Debtors' Settlements Under Federal Rule of Evidence 408 (Docket No. 2924). The Court has overruled these objections, but granted a continuing objection that Debtors expressly preserve and do not waive. *See* Order Denying Renewed Motion of Debtors to Exclude Evidence of Debtors' Settlements Under Federal Rule of Evidence 408 (Docket No. 3057).

A. The discipline of Law and Economics has long recognized that settlements are distinct from the expected outcome of litigation

Law and Economics is a well-established discipline applying economics to legal issues.[178] The literature of Law and Economics has studied for more than forty years the relationship between settlements and expected outcomes of trial, including seminal works by Richard A. Posner (now Judge Posner) and George L. Priest (professor at Yale Law School and an expert for the Debtors).[179]

This literature recognizes that settlements and expected outcomes of litigation are not the same thing.[180] Settlements that defendants and plaintiffs are willing to agree to are determined by both the parties' expectations about the litigation's outcome and the costs they avoid by settling instead of continuing to litigate (the "avoidable costs").[181]



[178] Tr. 2735:15-2736:3 (Bates).
[179] Tr. 2736:4-22 (Bates).
[180] Tr. 2736:23-2737:20, 4755:20-4756:18 (Bates).
[181] *Id.*; Bates Demonstrative Slides at 22 (GST-8005).

The expected outcome if the parties continue to litigate is determined by the potential compensatory award multiplied by the plaintiff's likelihood of success.[182] Avoidable costs, on the other hand, consist of all the costs of litigation, including discovery, trial, and other costs.[183]

The Law and Economics literature models a defendant's maximum offer and a plaintiff's minimum acceptable settlement. The defendant's maximum offer equals the outcome expected by the defendant (compensatory award multiplied by likelihood of plaintiff success) plus the defendant's avoidable costs, because any offer less than that leaves the defendant better off than if it continued to litigate.[184] A plaintiff, by contrast, will rationally be willing to accept in settlement the outcome he expects, minus the costs he avoids by settling rather than litigating, which likewise would make him better off than if he litigated.[185]

Importantly, in contingency fee litigation, the plaintiff's potential recovery from litigation and avoidable costs are different from the defendant's potential loss from litigation and its avoidable costs. Whereas a defendant pays its lawyers by the hour or otherwise based on work performance and pays the entire judgment if the plaintiff wins, the plaintiff does not pay for his lawyer's time, but instead pays the lawyer a percentage of the ultimate recovery—whether that recovery happens through settlement or litigation and without regard to the lawyer's time.[186] Thus, the contingency fee is not part of the plaintiff's avoidable costs. As a result, the plaintiff's expected outcome from litigation equals his likelihood of success multiplied by his recovery if he wins (one minus the contingency rate times the expected judgment).[187] His avoidable costs equal

[182] Tr. 2741:20-2743:3 (Bates).
[183] *Id.*
[184] *Id.*
[185] Tr. 2743:9-2744:14 (Bates).
[186] *Id.*
[187] Tr. 2742:8-12 (Bates).

all of the non-contingency costs he must bear, such as expert fees, court costs, emotional costs, and so on.[188]

When the defendant's maximum offer exceeds the plaintiff's minimum acceptable settlement, it is in the parties' interest to settle.[189] The Law and Economics literature and game theory predict that, when both parties are represented by experienced professionals, a settlement will occur where the benefits from settling are shared equally.[190]

If instead the plaintiff's minimum acceptable settlement is greater than the defendant's maximum offer, a bargain is not possible and the case goes to trial.[191] The Law and Economics literature (including the article by Professor Priest) predicts that trials will occur when the plaintiff's view of the expected outcome of the litigation exceeds the defendant's view of the expected outcome of the litigation by more than the mutual costs of litigating.[192] When that is the case, both parties believe that they will be better off going to trial than settling. Thus, cases go to trial when the parties have a substantial disagreement about the expected outcome. In any civil litigation, this will occur in only a very small percentage of cases, and it will occur in a sample of cases that are neither random nor representative of all the cases.[193]

Law and Economics thus recognizes that, because settlements depend not only on expectations about the outcomes of trial, but also on the plaintiff's and defendant's costs of litigating, settlements are not the same as expectations about the outcome of litigation.[194] Indeed,

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[188] Tr. 2742:17-23 (Bates).
[189] Tr. 2744:15-2745:3 (Bates).
[190] *Id.*
[191] Tr. 2745:4-2747:1 (Bates).
[192] *Id.*
[193] Tr. 2738:16-2739:6 (Bates); *see also In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1019 (5th Cir. 1997) (holding that tort cases selected for trial by parties are necessarily unrepresentative of larger pool of cases and cannot be extrapolated).
[194] This universally accepted principle is a primary reason why, in federal court, settlements are not admissible to prove or disprove the validity or amount of a disputed claim. *See* Advisory Notes to Rule 408 (evidence of

this literature establishes that a plaintiff with *no* expected chance of winning still can recover a settlement by threatening to impose costs on a defendant if litigation continues. Such costs make it in the defendant's economic interest to agree to a settlement, despite no risk of liability.[195]

B. Garlock's pre-petition settlements did not reflect expected judgments of settling mesothelioma claimants, because they were driven by avoidable costs and non-disclosure of evidence

Garlock's settlements did not reflect expected judgments because the vast majority of settlements were driven by avoidable costs, while a small number were driven by both avoidable costs and the illusion of trial risk created through non-disclosure of exposure evidence key to Garlock's defense.

As recounted above, Messrs. Turlik and Magee explained that, prior to the Bankruptcy Wave, factors such as the plaintiff's likelihood of success and Garlock's share of a potential compensatory award were immaterial to Garlock's settlement decisions. Those settlements, these witnesses testified, were driven by a "focus . . . on avoidable costs."[196]

After the Bankruptcy Wave, Garlock's settlements continued to be dominated by avoidable costs. But to supply the alternative exposure evidence that plaintiffs no longer provided, Garlock's costs increased. Garlock "had to do much more with its case to try to demonstrate that. It had to work a lot harder and its lawyers had to spend a lot more time to develop the information."[197] This increase in costs also increased Garlock's settlements because it was willing to pay more to avoid higher litigation costs.[198]

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settlement "is irrelevant, since the offer may be motivated by a desire for peace rather than from any concession of weakness of position").
[195] Tr. 2739:17-2741:4 (Bates).
[196] Tr. 1394:3 (Magee); *see also* Tr. 1404:2-3 (Magee) (noting that "it was all about cost avoidance"); Tr. 2248:5-14, 2249:13-21 (Turlik); Tr. 4664:14-16 (Glaspy).
[197] Tr. 3088:21-24 (Magee).
[198] Tr. 3088:11-3089:12 (Magee).

In a smaller number of cases, the absence of exposure evidence created "an illusion of liability, but real trial risk from that illusion of liability" that increased plaintiff's likelihood of success at trial.[199] This new environment also meant that Garlock "was going to get a larger compensatory award share because those other companies weren't going to be present in the courtroom or on the verdict form."[200] Consequently, settlement payments rose even though Garlock's actual legal liability based on all the evidence did not change.

Dr. Charles Bates, the only economist and econometrician among the expert witnesses who provided estimates in this case, corroborated this fact testimony using accepted econometric techniques.[201]

In his first opinion, Dr. Bates applied the sciences of economics and econometrics, and the literature of Law and Economics, to conclude that Garlock's settlements were many times greater than the expected outcome of mesothelioma trials against it.[202] Dr. Bates observed that in asbestos litigation, a defendant's avoidable costs include defense lawyer costs as well as other costs, such as expert costs, contribution costs, and appeal costs.[203] Plaintiffs also have costs (including emotional costs, expert costs, and the time value of money), but pay their lawyers on a contingency fee basis rather than by the hour.[204] Thus, the plaintiff lawyer's fee is not an avoidable cost for plaintiffs in mesothelioma litigation. Instead, the plaintiff pays the lawyer a

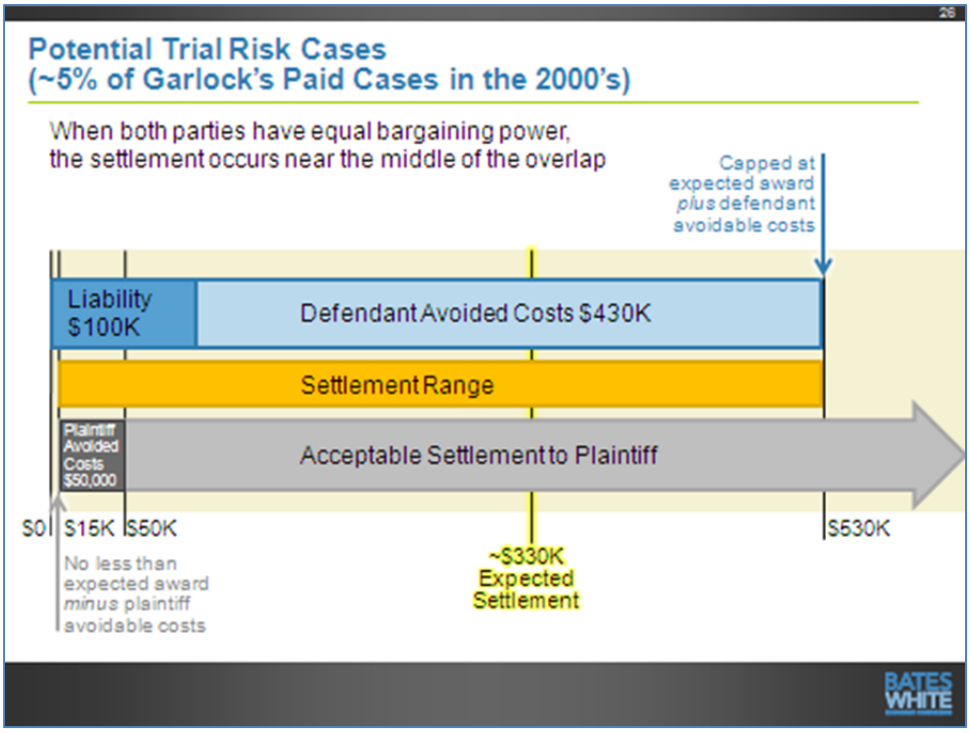
[199] Tr. 1394:10-14, 3088:25-3089:2 (Magee).
[200] Tr. 3089:4-9 (Magee); s*ee also* Tr. 2573:20-2574:7 (Magee).
[201] *Compare* 2709:13-2710:24 (Bates) (PhD in economics), 2711:1-22 (specialty in mathematical modeling of economic systems and applying statistics and mathematics to such modeling), 2712:10-14 (four articles on econometrics published in peer-reviewed journals), 2702:10-13, 20-21 (founder of economic consulting firm) *with* Tr. 4290:1-11 (Rabinovitz) (not an economist, econometrician, or statistician) *and* Tr. 4007:15-20, 4008:8-23 (Peterson) (same). Dr. Bates was qualified by the Court as an expert in economics, econometrics, and asbestos claim estimation. Tr. 2734:14-23 (Bates).
[202] Tr. 2705:6-9, 2735:8-14 (Bates).
[203] Tr. 2747:2-2748:21 (Bates).
[204] *Id.*

portion of his recovery, whether that recovery happens by litigation or settlement, and regardless of when the case is resolved and how much effort his lawyers is required to expend.[205]

Dr. Bates therefore hypothesized that Garlock's avoidable costs were much higher than plaintiffs' avoidable costs in mesothelioma litigation. His hypothesis was further supported by the observation that plaintiffs typically sue over 50 defendants, multiplying the aggregate avoidable costs of all defendants but not those of the plaintiffs, and magnifying the difference between plaintiff and defendant avoidable costs, since the plaintiff only avoids costs when he settles with the last defendant.[206]

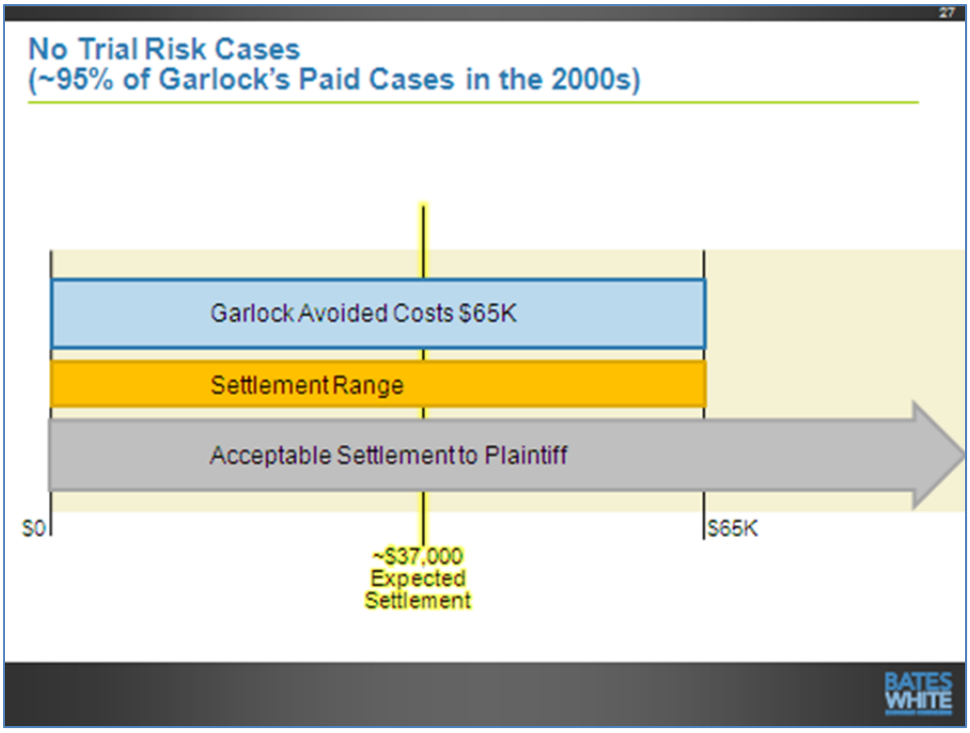
Dr. Bates reviewed two examples showing how, given a disparity in avoidable costs between defendants and plaintiffs, and expected litigation outcomes lower than the costs, settlements would exceed expected litigation outcomes by many times.[207] First, he posited a scenario (depicted on the slide below) where the expected judgment is $100,000, Garlock's avoided costs are $430,000, the plaintiff's avoided costs are $50,000, and the contingency rate is 35%.[208] In this situation, the defendant would be willing to pay a settlement up to $530,000 (expected judgment plus defendant's avoided costs). The plaintiff would be willing to accept a settlement above $15,000 (an expected judgment of $100,000 discounted by thirty-five percent to account for the contingency fee, minus $50,000 in avoided costs). On average, given equal bargaining power, one would expect a settlement of $330,000. That settlement divides equally the aggregate benefits of settling: a $200,000 benefit for Garlock ($530,000 - $330,000 = $200,000) and a $200,000 benefit for the plaintiff ($330,000 * 0.65 - $15,000 = $199,500). Such a settlement is many times greater than the expected judgment.

[205] *Id.*
[206] Tr. 2751:8-2752:14 (Bates).
[207] Tr. 2753:22-2758:2 (Bates).
[208] Bates Demonstrative Slides at 26 (GST-8005).



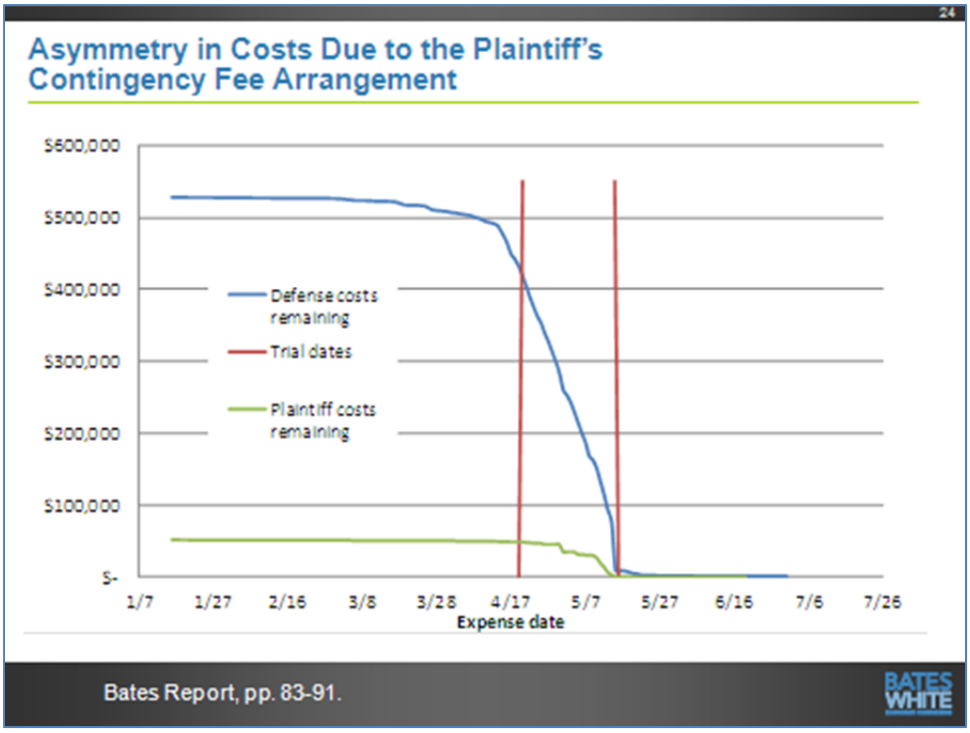
Dr. Bates reviewed another example (depicted below) showing that even if the expected outcome is zero, one would expect a positive settlement driven by the costs that would be required to obtain a dismissal.[209] If Garlock had avoided costs of $65,000, it would be willing to pay a settlement up to $65,000. Given equal bargaining power, the model predicts an average settlement of approximately $37,000, which splits equally the gains from settling.

[209] Bates Demonstrative Slides at 27 (GST-8005).



Dr. Bates hypothesized that Garlock, as a low-dose defendant, had avoidable costs that exceeded the expected outcome of litigation. Thus, as in these examples, Garlock's settlements were many times greater than its expected liability at trial. At trial, he described one particular tried case where records maintained by Garlock showed over $500,000 in costs, most of which was lawyer time. The plaintiff would not have had similar costs because of the contingency fee arrangement, and therefore a similar, huge cost of going to trial would not have influenced the plaintiff's settlement decision:[210]

[210] Bates Demonstrative Slides at 24 (GST-8005).



Dr. Bates, like any careful scientist, then tested his hypothesis using valid statistical methods applied to data about Garlock's history.[211] In the Fourth Circuit, all expert testimony on scientific subjects must meet these standards. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 593 (1993) ("Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified: indeed, this methodology is what distinguishes science from other fields of human inquiry."); *United States v. Bynum*, 3 F.3d 769, 773 (4th Cir. 1993) (" 'Scientific' knowledge is generated through the scientific method—subjecting testable hypotheses to the crucible of experiment in an effort to disprove them. An opinion that defies testing, however defensible or deeply held, is not scientific."); *Buckman v. Bombardier Corp.*, 893 F. Supp. 547, 554 (E.D.N.C. 1995) ("[A]n expert's evidence purporting to pertain to scientific knowledge must be founded in the scientific method (i.e., reviewing data, generating hypotheses, and testing them to see if they can be falsified.").

[211] Tr. 2707:25-2709:12 (Bates).

Dr. Bates first observed that actual trial outcomes—jury verdicts—vary strongly and reliably with the age of the plaintiff, with younger plaintiffs receiving approximately four percent per year more than older plaintiffs.[212] Avoidable costs, on the other hand, do not vary with the age of the plaintiff.[213]

Thus, by examining how Garlock's settlements varied with the age of the plaintiff, Dr. Bates was able to determine the extent to which Garlock's settlements were driven by the expected outcome of litigation as opposed to the avoidable costs.[214] If, for example, settlements also decreased by four percent per year of plaintiff age, that would show that settlements were driven by expected outcomes of litigation (which vary by plaintiff age), and invalidate Dr. Bates's hypothesis based on the Law and Economics model. If, on the other hand, settlements decreased by less than four percent per year of plaintiff age, that would show the settlements were also driven by avoidable costs to a greater or lesser degree.

The result of the age test confirmed Dr. Bates's hypothesis.[215] The test showed that, in the 2000s, the 95% of settlements less than $200,000 demonstrated no detectable variance with age, thus indicating no detectable likelihood of plaintiff success but indicating avoidable costs of approximately $65,000. In the remaining five percent of cases, avoidable costs were still important, though exhibiting a chance of plaintiff success. The settlements in these cases implied, on average, plaintiff likelihood of success of 17% and avoidable defense costs of $430,000.[216]

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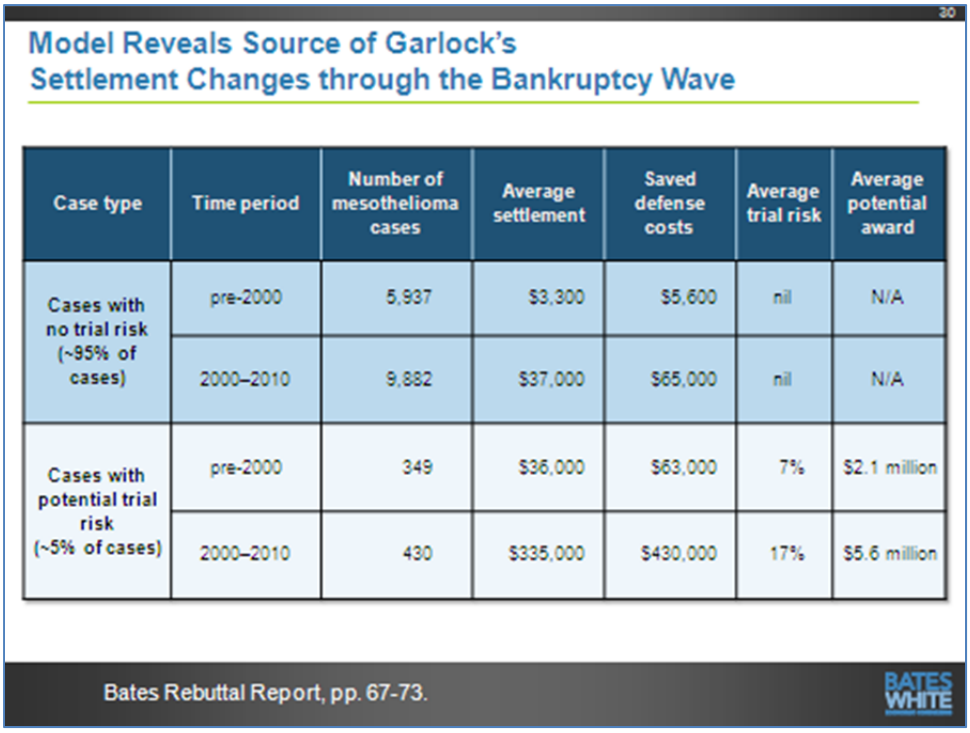
[212] Tr. 2763:23-2765:13 (Bates).
[213] *Id.*
[214] *Id.*
[215] Tr. 2765:14-2770:10 (Bates).
[216] Bates Demonstrative Slides at 30 (GST-8005); Tr. 2759:16-2763:20 (Bates); *see also* Tr. 2908:8-2909:17 (Bates) (explaining how determined $200,000 break point using both economic and statistical tests). How Dr. Bates calculated the plaintiff likelihood of success and avoidable defense costs implied by these settlements is discussed *infra* Subsection III.E.



Dr. Bates's statistical test also showed why Garlock's settlements increased between the 1990s and 2000s: primarily because of an increase in avoidable costs, as well as a small increase in trial risk in five percent of the cases.[217]

Thus, Dr. Bates, using valid statistical techniques, corroborated Mr. Magee's, Mr. Turlik's, and Mr. Glaspy's account of why Garlock's settlements increased. It became more costly for Garlock to defend cases after the Bankruptcy Wave, leading to an increase in avoidable costs and settlements, and in a small number of cases, Garlock's trial risk increased.[218] For both of these reasons, Garlock's settlements did not reflect expected trial outcomes.

C. The Committee and FCR offered no evidence demonstrating that Garlock's settlements were a measure of expected trial outcomes

The Committee and FCR did not attempt to demonstrate that Garlock's settlements were a measure of expected judgments mesothelioma claimants could have obtained against Garlock.

[217] Tr. 2758:19-2759:15 (Bates).
[218] *Id.*, 2748:22-2750:25 (Bates).

1. Dr. Rabinovitz offered no model of the relationship between settlements and liability, or any statistical testing of such a model

First, the Committee and FCR presented no expert testimony establishing that Garlock's settlements measured expected judgments. Dr. Rabinovitz, who testified for the FCR, is not an economist, econometrician, or statistician, and her training is in political science.[219] It is thus doubtful that she has the expertise to address whether Garlock's settlements were a measure of the judgments mesothelioma claimants could have expected to obtain.

In any event, Dr. Rabinovitz presented no science demonstrating that Garlock's settlements were a measure of expected judgments. The only theory she presented about asbestos litigation was that it is "an industry" where cases are not negotiated individually. She said asbestos litigation is "not a matter of individuals bringing cases in the traditional Chicago-style law and economics mode. These are not individuals. This is an industry operating a mass tort. It's very different."[220]

But Dr. Rabinovitz presented no data to support her "asbestos litigation as industry" hypothesis, much less any statistical testing of that hypothesis. To the contrary, the facts of record in this case contradict her hypothesis.[221] Due to the lack of any testing of her hypothesis, Dr. Rabinovitz's opinion that asbestos litigation is an "industry" does not meet the standards for admissibility of scientific testimony in the Fourth Circuit, or offer a credible alternative to Dr. Bates's analysis. *See Bynum*, 3 F.3d at 773.

Finally, even if asbestos litigation were an "industry," that does not show any relationship between settlements and trial risk. To the contrary, as Dr. Bates testified, if cases are settled in

[219] Tr. 4290:1-11 (Rabinovitz).
[220] Tr. 4367:11-4369:8 (Rabinovitz); *see also* Tr. 4193:14-4194:14 (Rabinovitz).
[221] Iola Dep. at 33:11-18 (responding, as a prominent negotiator for Waters & Kraus, to a question about negotiations: "Q. Do you typically negotiate individual settlements or sometimes do you negotiate group settlements? A. I always negotiate individual settlements. Q. Is that to say that you are not involved in negotiating group settlements? A. That's correct."); s*ee also* Tr. 1403:5-16 (Magee).

bulk, without any attention to individual merits, one would expect them to have even less to do with trial risk, and to be purely about processing cases at the lowest aggregate cost.[222]

Dr. Rabinovitz also appeared to be mistaken about the facts in a way that seriously calls into question her expertise. She testified that she assumes in a settlement, the asbestos defendant says "yes, we're responsible for this injury. . . . We participated in the causation of this injury."[223] This assumption contradicts principles of law and economics intuitively understood by lawyers who negotiate settlements, as well as the language of every release ever obtained by Garlock from an asbestos plaintiff, each of which provided that Garlock was expressly not stipulating to liability.[224]

2. Dr. Peterson likewise offered no model of the relationship between settlements and liability, or any statistical testing of such a model

Dr. Peterson also is not an economist, econometrician, or statistician.[225] His training is in experimental social psychology, a field he did not apply in this case.[226] It is doubtful whether he has the expertise to address the question of how settlements relate to trial risk.

In any event, like Dr. Rabinovitz, he did not attempt to draw any connection between settlements and trial risk.[227] Instead, like Dr. Rabinovitz, he simply criticized the model Dr. Bates used, saying it did not apply in asbestos litigation because cases are "settled in groups, not individually."[228] But as noted above, if anything, this makes the relationship between trial risk and settlements even more attenuated. Indeed, Dr. Peterson admitted that in Garlock's group settlements—which formed the bulk of Garlock's settlements—trial risk was not much of a

[222] Tr. 4861:14-4863:4 (Bates).
[223] Tr. 4359:4-6 (Rabinovitz).
[224] Tr. 3036:7-20 (Magee).
[225] Tr. 4007:15-20, 4008:1-23 (Peterson).
[226] *Id.*
[227] Tr. 4756:19-4757:10 (Bates).
[228] Tr. 3993:5-21 (Peterson).

factor in settlement because the cases "haven't gotten that far yet, they can't assess the risk."[229] Dr. Peterson further admitted that in group settlements, "[e]ach side knows the other side is saving litigation costs, and that's one of the reasons that each side understands the other is willing to enter into this deal."[230]

Dr. Peterson offered no alternative hypothesis about the relationship between settlements and trial risk, much less any statistical testing of such a hypothesis. *See Bynum*, 3 F.3d at 773. Instead, Dr. Peterson criticized any attempt to model the relationship as "the Chicago economics view of the world, and they have an unusual view of the world. They don't know the nitty-gritty and the kind of—they don't know how the sausage is made."[231]

Curiously, despite this criticism, Dr. Peterson admitted the validity of the basic elements of the standard Law and Economics model. He agreed that avoidable costs can affect decisions about settlement—indeed, he previously testified in this Court, "That's why 99.9 percent of the cases settle, rather than going to trial, because both sides know that these are expensive propositions."[232] Dr. Peterson also recognized that plaintiffs take into account a substantial risk of losing their case: "You've got a big chance you'll get nothing."[233] Finally, he recognized that both trial outcomes and settlement values can be affected by compensatory damages factors, including the number of potentially responsible defendants.[234]

In fact, the only part of the standard Law and Economics model that Dr. Peterson ended up disagreeing with was the contingency fee feature of the plaintiff's settlement decision. He argued that instead of modeling the plaintiff's decision—including the deduction from any

[229] Tr. 3983:24-3984:24 (Peterson).
[230] Tr. 4129:12-4130:2 (Peterson).
[231] Tr. 3993:25-3995:5 (Peterson).
[232] Tr. 3981:18-3983:23 (Peterson).
[233] Tr. 3942:7-8 (Peterson).
[234] Tr. 3984:25-3985:5, 3985:13-16 (Peterson).

recovery of the plaintiff lawyer's contingency fee, and the exclusion of the plaintiff lawyer's time from the plaintiff's avoidable costs—the plaintiff and plaintiff's lawyer should be treated as a "unity" because the plaintiff is "following the advice of his lawyer" who "thinks about the group as a whole, he and his client."[235] Dr. Peterson thus claimed that the contingency fee feature of the plaintiff's decision should be eliminated from the equation and one should "look at the total—total recovery of the two of them [the plaintiff and the plaintiff's lawyer]."[236]

But a plaintiff lawyer including his own interests—including his own time and costs—in his client's settlement calculus is a breach of fiduciary duty and a canonical violation of professional ethics.[237] Dr. Peterson presented no evidence to show that plaintiff lawyers are routinely violating their fiduciary duties in this way. He only stated, without support, that "I have the utmost confidence in the overwhelming greed of plaintiffs' lawyers."[238] This flip answer is not competent expert testimony, as it was supported by neither data nor testing. *See Bynum*, 3 F.3d at 773.

Finally, Dr. Peterson criticized Dr. Bates's conclusion that settlements under $200,000 did not indicate any expected likelihood of success, asserting that this threshold was arbitrary. In fact, Dr. Bates confirmed the $200,000 threshold several different ways: his age decrease test, an analysis under the standard Law and Economics model, and other statistical tests.[239]

Dr. Peterson observed that, if settlements below $200,000 are also included, the age decrease line still slopes downward.[240] But as Dr. Bates explained, *any* threshold that included

[235] Tr. 3990:25-3992:12 (Peterson).
[236] Tr. 3993:25-3995:5 (Peterson).
[237] *See, e.g.*, North Carolina Rule of Professional Conduct 1.7, comment [1] ("Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from . . . the lawyer's own interests."); comment [10] ("The lawyer's own interests should not be permitted to have an adverse effect on representation of a client.").
[238] Tr. 4131:8-25 (Peterson).
[239] Tr. 4826:14-20 (Bates).
[240] Tr. 3945:23-3948:19 (Peterson).

settlements above $200,000 would show slope, because combining lines with slope and no slope yields a line with slope.[241] Dr. Peterson's point was therefore a trivial one.

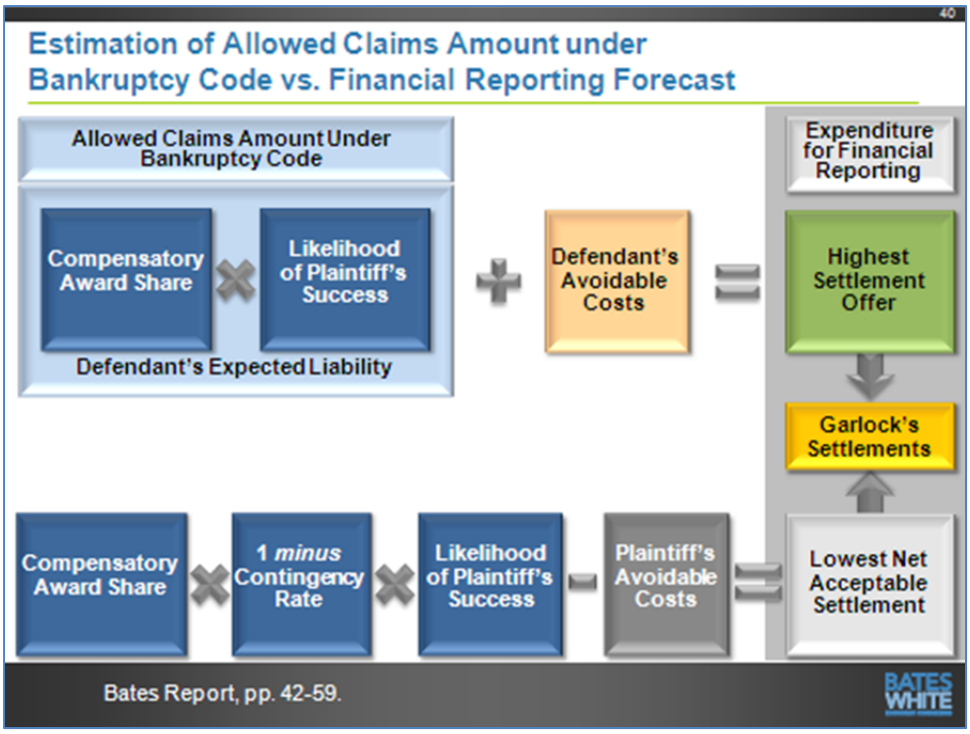
Dr. Peterson also asserted that settlements below $200,000 do vary with jurisdiction and the plaintiff's life status, which are factors that like age affect the plaintiff's damages.[242] But Dr. Peterson missed the point of Dr. Bates's analysis. If settlements do not vary based on a factor provably related to liability—such as age—that proves the settlements are not related to liability.[243] The converse is not true, because factors such as jurisdiction and life status also affect the cost of litigation, and thus might vary even if the settlements are not liability-related. In any event, Dr. Peterson made no attempt to determine whether jurisdiction and life status were so confounded, and presented no statistical testing of that. Most important, he did not shake Dr. Bates's key finding that settlements below his threshold did *not* vary with the age of the plaintiff.

3. Financial reporting projections and other fact evidence do not demonstrate that Garlock's settlements equated to estimates of trial risk

In the absence of any competent expert testimony either demonstrating a connection between settlements and trial risk—or even any competent testimony challenging Dr. Bates's conclusion that they are not the same thing—the Committee and FCR repeatedly referred to various pieces of fact evidence. First, they relied on pre-petition expenditure estimates that Dr. Bates prepared for Garlock's parent to use in financial reporting. But as both Mr. Magee and Dr. Bates explained, these estimates had nothing to do with expected judgments: they were a projection of future settlements, which were themselves dominated by cost avoidance concerns,

[241] Tr. 4823:25-4825:1 (Bates).
[242] Tr. 3948:20-3951:23 (Peterson).
[243] Tr. 2763:23-2765:13 (Bates).

not liability concerns.[244] In other words, they dealt with the right side of the Posner equation, not the left, as shown graphically below:[245]



Second, the Committee and FCR relied on evidence from Debtors' officers and employees stating that they considered trial risk when settling some cases against Garlock.[246] But this merely restates an obvious part of the standard Law and Economics model, which includes trial risk as one of the factors influencing settlement decisions. This does nothing to prove that Garlock's settlements are, in general, a measure of its trial risk. To the contrary, as Dr. Bates showed, the Law and Economics model and valid statistical testing of Garlock's settlements using that model show that the vast majority of settlements were motivated entirely by the cost of defense, and that even those settlements reflecting an expectation of trial risk were also many times more than the expected liability.

[244] 3044:9-17, 3054:16-3055:15 (Magee); 2776:3-2778:7, 2831:8-2832:13, 4755:20-4756:18 (Bates)
[245] Bates Demonstrative Slides at 40 (GST-8005).
[246] *See, e.g.*, Major Expense Project Approval Form dated Feb. 9, 2004, GST-EST-0556299 (ACC-754).

III. Current and future mesothelioma claimants could expect to obtain no more than $125 million if their claims were allowed

Because settlements as a factual (as well as legal) matter are not a measure of the judgments current and future mesothelioma claimants could obtain from Garlock, Debtors presented expert testimony from Dr. Bates placing an upper bound on the number of claimants who could obtain judgments against Garlock, and the judgments they might obtain. *See In re Dow Corning Corp.*, 211 B.R. at 566, 560 n.13; *In re Farley, Inc.*, 146 B.R. at 753; *In re Ralph Lauren Womenswear*, 197 B.R. at 775. Debtors requested that Dr. Bates determine the expected outcome of litigation against Garlock assuming (1) all individuals who allege direct or indirect contact with Garlock's asbestos-containing products proceed to trial and final judgment, (2) courts do not exclude plaintiff or defendant causation evidence, and (3) courts and juries have access to all information that individuals or their counsels have or can reasonably obtain regarding such individual's asbestos exposure.[247]

At trial, experts for the Committee and FCR criticized these assumptions as unrealistic and slanted toward Garlock. In fact, however,

- The first assumption is a claimant-favorable assumption.[248] It adopts the position of the Committee and FCR that any individual who alleges contact (direct or indirect) with a Garlock asbestos-containing product is entitled to a trial. Precedent, as well as Debtors' medical and industrial hygiene evidence, demonstrate this is not in fact correct. *See, e.g.*, *Moeller v. Garlock Sealing Technologies, LLC*, 660 F.3d 950, 955 (6th Cir. 2011) ("[T]here is simply insufficient evidence to infer that Garlock gaskets probably, as

[247] Tr. 2770:21-2772:3 (Bates).
[248] Tr. 2772:10-2773:2 (Bates).

opposed to possibly, were a substantial cause of Robert's mesothelioma.") (GST-1310). Nevertheless, Dr. Bates adopted this assumption in his estimate.

- The second assumption is also a claimant-favorable assumption. It adopts the position of the Committee and FCR that claimants' causation evidence would be admitted at trial, despite *Daubert* and other rules that would apply in federal court to exclude much of the scientific evidence upon which they rely. This assumption is also not in fact correct. *See, e.g.*, *Wannall*, 2013 U.S. Dist. LEXIS 68523, at *50-53 (D.D.C. May 14, 2013).
- Finally, the third assumption is nothing more than the criterion of a minimally fair system of justice: that courts and juries have access to all information that individuals or their counsels have or can reasonably obtain regarding such individual's asbestos exposure. The assumption mirrors the discovery obligations imposed by state law.[249] It simply means that the jury gets to see all relevant exposure facts that the parties know.

As Dr. Bates explained, he did not interpret the third assumption to mean perfect or full information about the claimant's asbestos exposures.[250] To the contrary, as explained more fully below, Dr. Bates rejected attempting to estimate claimants' actual number of asbestos exposures, instead using for his work only the exposures actually identified by a sample of claimants during discovery in this case.[251] The main import of the third assumption is that hiding evidence is not allowed, as would be the case in any fair system for allowing mesothelioma claims in this case.

Under these assumptions, Dr. Bates concluded that the judgments claimants would expect to obtain—their expected award from Garlock discounted by their likelihood of success—are

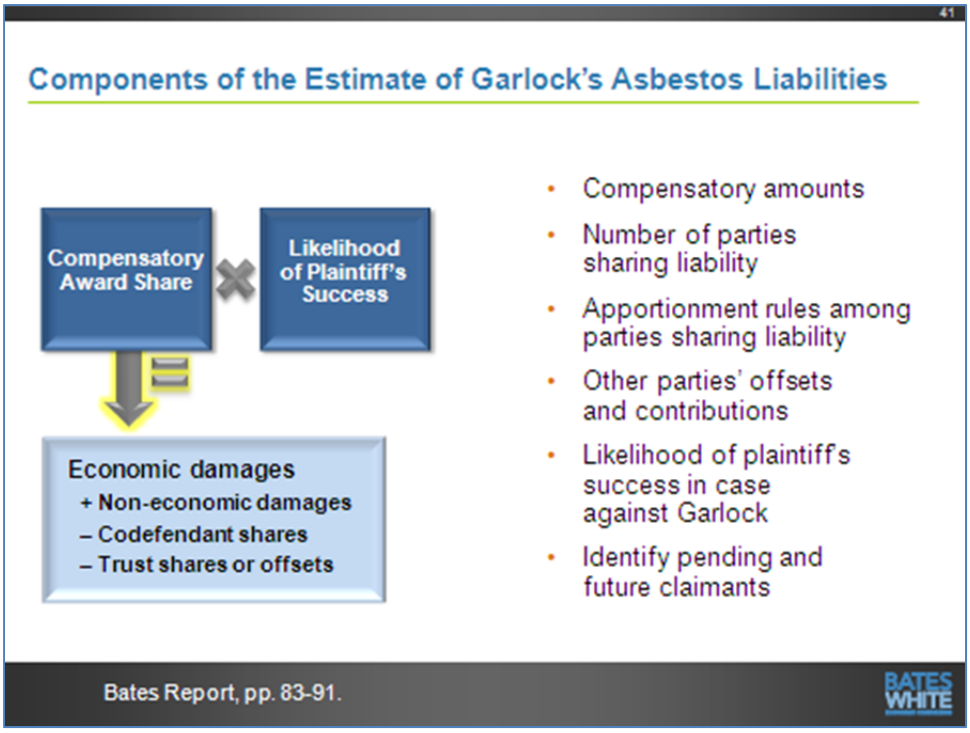
[249] *See, e.g.*, Cal. Civ. Proc. Code § 2017.010; Tex. R. Civ. P. 192.3; N.Y. C.P.L.R. 3101; Pa. R. C. P. No. 4001; *Regency Health Servs. v. Superior Court*, 64 Cal. App. 4th 1496, 1504 (Cal. App. 2d Dist. 1998) ("When responding to discovery, counsel generally has a duty to disclose information known to counsel . . ."); Tex. R. Civ. P. 193.1 ("[A] party must make a complete response, based on all information reasonably available to the responding party or its attorney at the time the response is made.").
[250] Tr. 2772:4-9 (Bates).
[251] Tr. 2773:3-2773:13 (Bates).

significantly less than $125 million (net present value at a three percent real risk-free discount rate).[252] He calculated that pending claimants would obtain less than $25 million and future claimants less than $100 million (net present value).[253]

A. Parameters estimated by Dr. Bates

To calculate these figures, Dr. Bates had to estimate the parameters relevant to the "expected outcomes" part of the Law and Economics model. In particular, he needed to estimate (1) the compensatory award an average claimant might obtain against all defendants (consisting of economic and non-economic damages), (2) Garlock's potential share of any such award (the total award minus co-defendant shares and Trust shares or offsets for Trust payments), (3) the likelihood the claimant would obtain that award, (4) the number of pending and future claimants alleging contact with a Garlock asbestos-containing product (the population of claimants who could, per state law and assumption one, potentially obtain an award), and (5) the discount rate.[254]

[252] Tr. 2705:10-15, 2773:14-2774:3 (Bates).
[253] *Id.*
[254] Tr. 2778:22-2780:1, 2813:21-2815:14, 2774:17-2776:2 (Bates); Bates Demonstrative Slides at 41 (GST-8005).



As with his opinion about the relationship between Garlock's settlements and its expected liability, Dr. Bates applied the scientific disciplines of economics and econometrics in his work.[255] These included the statistical methods outlined by Prof. Heckman in his testimony, including the use of confidence intervals and other measures of variability.[256]

B. Data relied upon by Dr. Bates

Dr. Bates's work rested on data collected and assembled into a database by Dr. Jorge Gallardo-Garcia (the "Garlock Analytical Database").[257] Dr. Gallardo-Garcia is an economist with a PhD from the University of Pennsylvania who specializes in using large amounts of data to model human behavior, and whom the Court qualified as an expert in statistical analysis,

[255] Tr. 4756:19-4757:10 (Bates).
[256] Tr. 4757:11-4758:5 (Bates); Tr. 4246:20-4249:1 (Heckman).
[257] Tr. 2780:11-21 (Bates).

economic modeling, and the construction of databases (including asbestos claims databases) for those tasks.[258]

To construct the Garlock Analytical Database, Dr. Gallardo-Garcia supervised the review of all claimant-related discovery ordered by the Court in this case (including the Mesothelioma Claim Questionnaire ("PIQ"), Supplemental Settlement Payment Questionnaire, Supplemental Exposure Questionnaire, data from the Delaware Claims Processing Facility, and ballots from 23 bankruptcy cases), in addition to numerous other available sources of data.[259] The resulting database contained extensive information about mesothelioma claimants with resolved or pending claims against Garlock, including their

- Exposure to Garlock asbestos products;
- Job histories (industry, occupation, and work site);
- Exposures to non-Garlock asbestos-containing products;
- Claims against tort system defendants and status of those claims;
- Claims against Trusts and the status of those claims;
- Recoveries from tort defendants and Trusts, and
- Ballots in Chapter 11 bankruptcy cases.[260]

Reviewers supervised by Dr. Gallardo-Garcia collected information from documents using objective methods and subject to rigorous quality control processes.[261] Dr. Gallardo-Garcia testified that the Garlock Analytical Database exceeds the standards of reliability required in

[258] Tr. 2611:18-25, 2612:8-13, 2617:14-17, 2619:12-13, 2619:22-2620:15 (Gallardo-Garcia).
[259] Tr. 2630:17-2631:2, 2634:25-2635:6 (Gallardo-Garcia).
[260] Tr. 2625:12-2626:23, 2629:2-2630:5 (Gallardo-Garcia); *see also* Garlock Analytical Database (GST-8002).
[261] Tr. 2635:7-23, 2636:5-25, 2638:2-19, 2638:20-2639:5, 2641:3-11, 2644:17-22, 2639:6-2641:2, 2642:5-12, 2641:16-2642:4, 2642:13-20, 2642:21-2644:16, 2644:23-2645:20, 2644:23-2646:2, 2649:4-22, 2650:4-8 (Gallardo-Garcia).

economic research.[262] He also testified that, in his extensive experience, it is the most extensive database about asbestos claims and claimants he has ever seen.[263]

At trial, the Committee and FCR did not challenge the quality of the Garlock Analytical Database and its reliability, either through cross-examination of Dr. Gallardo-Garcia or Dr. Bates, or through their own expert witnesses. Thus, Dr. Gallardo-Garcia's testimony about the integrity of the database upon which Dr. Bates relied went unrebutted.

C. Total potential compensatory award

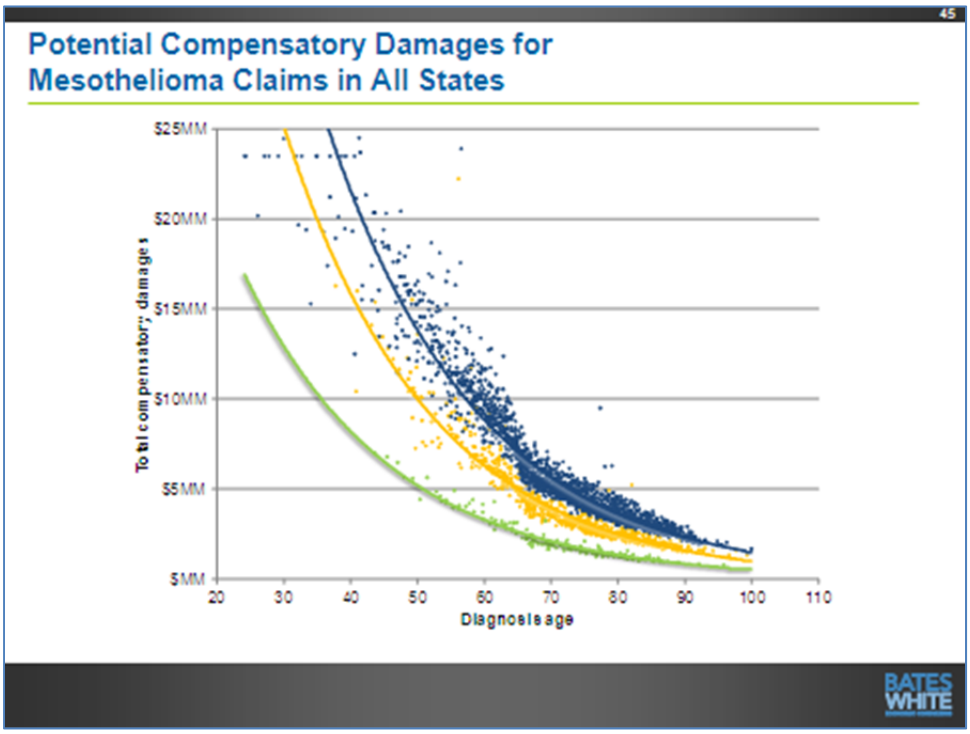
To estimate total potential compensatory awards, Dr. Bates started with a database of hundreds of publicly reported mesothelioma verdicts.[264] Then, because Law and Economics has recognized (since a seminal article by Professor Priest) that tried cases are neither random nor representative of the entire pool of claims[265] (a point not disputed at trial),[266] Dr. Bates examined whether the verdicts were representative of current and future claims against Garlock.

Dr. Bates determined that as compared to the average claimant against Garlock, the observed verdicts tended to have younger plaintiffs, in higher value states, with plaintiffs more likely to be alive at trial—all factors that tend to increase the size of the verdict.[267] Dr. Bates therefore applied a regression to translate observed verdicts to amounts appropriate for Garlock's general mesothelioma claiming population by controlling in this way for three statistically significant factors: jurisdiction (divided into high, medium, and low verdict states), claimant age,

[262] Tr. 2620:16-2621:1 (Gallardo-Garcia).
[263] Tr. 2630:6-12 (Gallardo-Garcia).
[264] Tr. 2627:7-2628:2 (Gallardo-Garcia).
[265] Tr. 2738:16-2739:16 (Bates).
[266] Tr. 4124:10-14 (Peterson); *see also In re Chevron U.S.A., Inc.*, 109 F.3d at 1019 (noting unrepresentativeness of cases selected for trial by parties).
[267] Tr. 2780:22-2781:18, 2785:17-2789:1 (Bates).

and claimant life status.[268] This enabled Dr. Bates to calculate the estimated total potential verdict that each pending and future claimant could obtain.

Dr. Bates displayed for the Court the estimated total potential awards for pending claimants, which fell along three lines representing the high, medium, and low verdict states:[269]



D. Garlock's potential share of total awards

Next, Dr. Bates calculated Garlock's potential share of total awards.

1. Classification of state apportionment regimes

First, Dr. Bates classified states into several, joint-and-several, and hybrid jurisdictions on the basis of a legal memorandum provided to him by Robinson Bradshaw & Hinson, P.A.[270] Where a state had a threshold for joint and several liability (for example, the 50% threshold

[268] *Id.*
[269] Bates Demonstrative Slides at 45 (GST-8005).
[270] Tr. 2789:2-2790:24 (Bates); Memorandum Regarding Law of Apportioning Damages in Asbestos Cases in Fifty States and District of Columbia, and Under Admiralty Law (Feb. 5, 2013) (GST-1305).

found in many states), Dr. Bates assumed Garlock did not meet it given the low-dose nature of Garlock's product and the large number of other parties that contributed to claimants' damages (as described below).[271]

2. Estimation of number of potentially liable parties

Dr. Bates then calculated the number of other responsible parties—both tort defendants and Trusts. Dr. Bates recognized that a company could be held liable on a number of legal theories, including (1) direct exposure to asbestos, (2) indirect exposure (take home exposure), (3) bystander exposure, (4) design, (5) distribution, (6) premises, and (7) conspiracy.[272] But in another conservative aspect of his forecast, Dr. Bates estimated only the number of parties potentially liable on the first three such theories, which are direct exposure, indirect exposure, and bystander exposure.[273] If he had estimated parties liable on other theories, Dr. Bates's estimate of the number of parties sharing liability would have been even higher.

Dr. Bates considered basing his estimate of the number of parties with potential exposure-based liability on (1) all exposures that claimants actually experienced ("exposures in fact"), (2) companies named by plaintiffs (typically 52 co-defendants and 23 Trusts), (3) the number of defendants typically present at trial (typically one or two defendants), and (4) exposures identifiable by the plaintiff.[274] He rejected reliance on "exposures in fact" because he did not have sufficiently reliable information to calculate that figure (which, however, likely numbers in the hundreds or thousands).[275] He rejected reliance on parties named in plaintiffs' complaints because it was not clear that such namings constituted an assertion of exposure to

[271] *Id.*
[272] Tr. 2790:25-2792:12 (Bates).
[273] *Id.*
[274] Tr. 2792:13-2796:17 (Bates).
[275] Tr. 2793:12-20 (Bates).

those companies' products.[276] He rejected reliance on the number of defendants who actually proceed to trial because that understates the number of responsible parties, as most defendants settle before trial and cases that go to trial are unrepresentative and often targeted by the plaintiff.[277]

Instead, Dr. Bates based his estimate on the number of exposures identifiable by the plaintiff, a number he determined through a study of nearly 1,300 claim files with data collected by Dr. Gallardo-Garcia and his team.[278] To provide a foundation for an estimate of the number of exposures identifiable by plaintiffs, Dr. Gallardo-Garcia drew a sample of PIQs and Supplemental Exposure Questionnaire responses that had attached interrogatories or depositions, and collected information on the other products to which claimants alleged exposure.[279] He also drew a sample of claim files from resolved cases, and collected the same information.[280] Finally, Dr. Gallardo-Garcia's Garlock Analytical Database also contained information on the Trust claims and ballots filed by the pending claimants.[281]

Dr. Bates determined that this sample upon which the study was based was representative of the entire claim pool.[282] He then determined, using Dr. Gallardo-Garcia's data, that the typical plaintiff alleges exposure to the products of 13 tort defendants (in addition to Garlock) and 22 Trusts (based on 18 filed Trust claims in PIQ responses and an average of 4 Trusts not yet established on the basis of ballots cast in those bankruptcy cases), for a total of approximately 36 parties that share the liability.[283]

[276] Tr. 2794:21-2795:1 (Bates).
[277] Tr. 2795:2-2795:19 (Bates).
[278] Tr. 2795:20-2796:17 (Bates).
[279] Tr. 2647:17-2650:8 (Gallardo-Garcia).
[280] Tr. 2654:21-2658:11 (Gallardo-Garcia).
[281] Tr. 2631:23-2632:22 (Gallardo-Garcia).
[282] Tr. 2797:8-2798:14, 2854:2-2856:24 (Bates).
[283] Tr. 2946:24-2947:11, 2950:5-2951:6 (Bates).

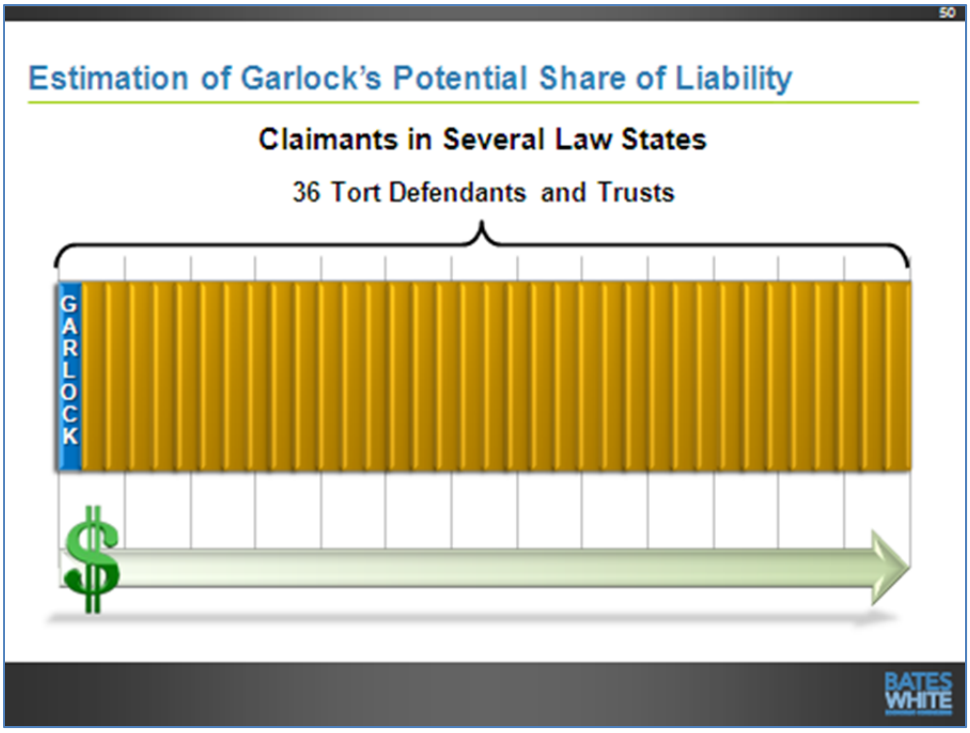
3. Estimation of claimant recoveries

Dr. Bates also calculated the recoveries that claimants would obtain from tort defendants and Trusts, for use in his joint and several calculation (as described below). This calculation was based on the Supplemental Settlement Payment Questionnaire sent to 1,000 randomly selected pending claimants, of which approximately 850 were returned.[284] Dr. Bates tested and verified the completeness of the data obtained from these questionnaires and estimated that typical claimants would receive tort recoveries ranging from $400,000 to $900,000 (on average $560,000) from eight or nine defendants, as well as approximately $600,000 from 22 Trusts, for a total of $1 million to $1.5 million.[285]

4. Estimation of Garlock's share of potential judgments

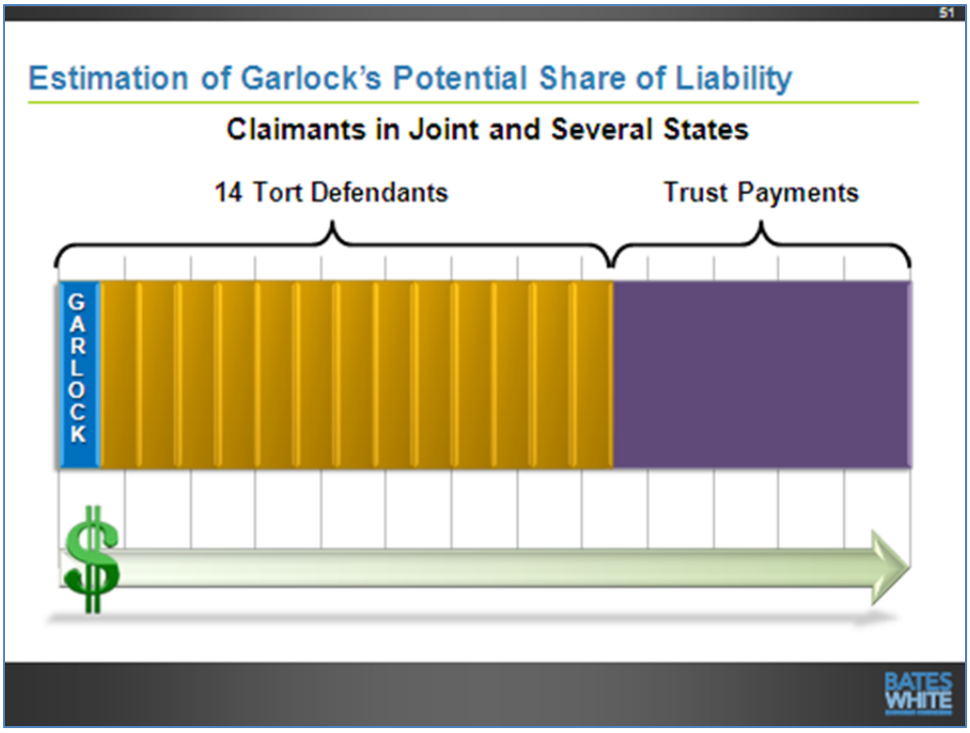
Dr. Bates used his estimates of the number of responsible parties and claimants' recoveries to estimate Garlock's share of any potential award. For several liability jurisdictions, he divided the total award equally, by 36. This was a conservative step given Garlock is a low-dose defendant and other defendants and Trusts are either comparable to Garlock, or manufactured insulation or other friable products that released far more asbestos into the air and would be expected to be assigned a higher share of responsibility than Garlock.[286] Indeed, Committee expert Dr. Peterson admitted that "in the scheme of all of the asbestos-containing products, gaskets are not the central source of asbestos exposures; I think there's no question about that."[287] The following slide depicts Dr. Bates's several liability calculation.[288]

[284] Tr. 2799:7-2801:2 (Bates); Tr. 2650:9-2651:12 (Gallardo-Garcia).
[285] Tr. 2799:7-2802:13 (Bates).
[286] Tr. 2802:14-2803:19 (Bates).
[287] Tr. 4038:18-4039:20 (Peterson); *see also* Tr. 4036:1-21 (admitting Garlock was a minor producer of asbestos products and not a significant defendant); Tr. 4037:9-21 (admitting thermal insulation and gaskets are different kinds of products with different defenses); Tr. 4040:18-4041:20 (admitting that "there's a serious causation problem with regard to" gaskets).
[288] Bates Demonstrative Slides at 50 (GST-8005).



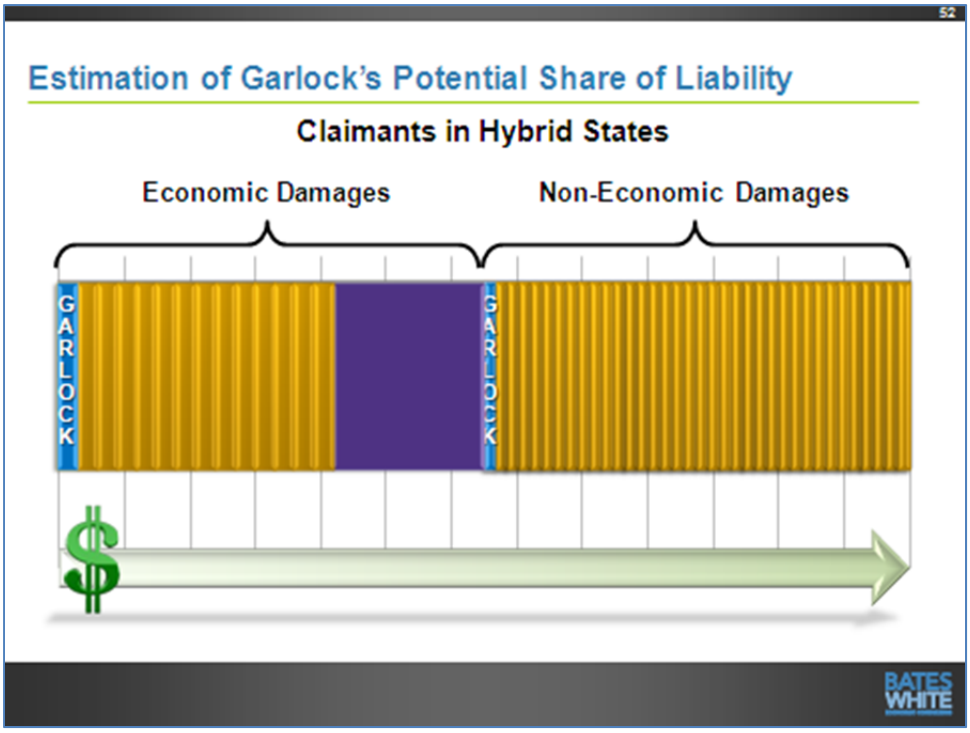
In joint and several jurisdictions, Dr. Bates deducted Trust payments instead of counting Trusts as shares, to account for the possibility that Trusts are not fully funding their liability, in which case the solvent defendants would bear the shortfall equally.[289]

[289] Tr. 2803:20-2804:24 (Bates); Bates Demonstrative Slides at 51 (GST-8005).



In hybrid states such as California and New York (where defendants have several liability for non-economic damages but joint and several liability for economic damages), Dr. Bates applied the several liability calculation to non-economic damages and the joint and several liability calculation to economic damages.[290] Dr. Bates calculated the split between economic and non-economic damages using a model of economic damages developed by Dr. Jeffrey Brown at Bates White, using standard economic methodologies employed in wrongful death cases, which base economic damages on lost wages, medical and funeral costs, benefits, and similar economic losses.[291]

[290] Tr. 2805:10-2806:6 (Bates); Bates Demonstrative Slides at 52 (GST-8005).
[291] Tr. 2782:3-2784:2 (Bates).

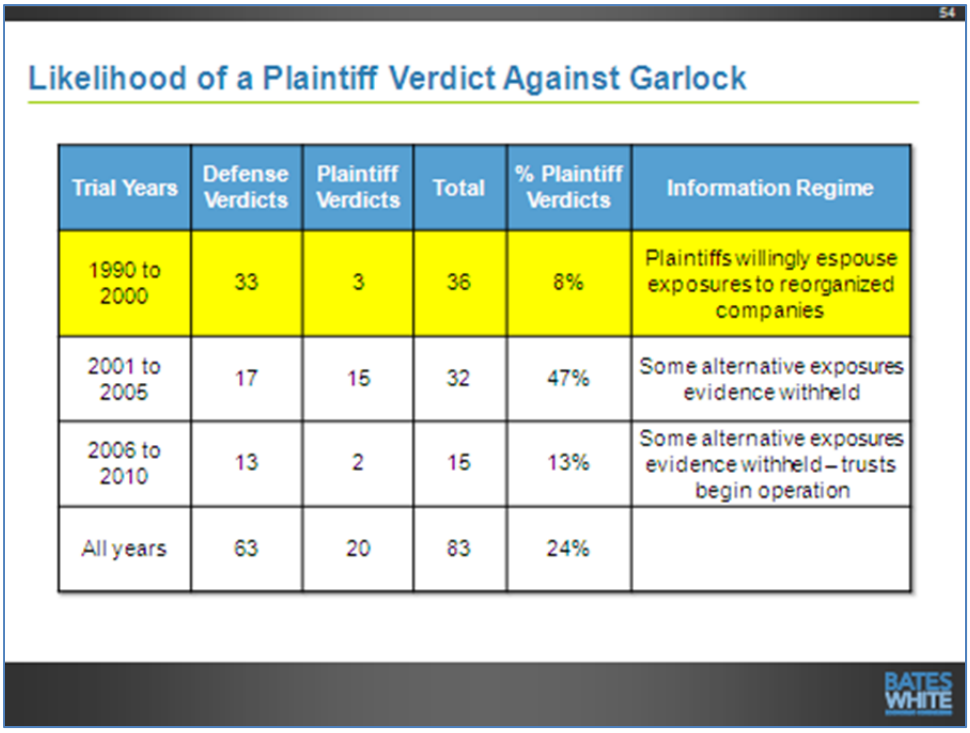


Dr. Bates also performed calculations in which he assumed all jurisdictions had several liability and all jurisdictions had joint and several liability, which confirmed his ultimate estimate (described below) that litigation would yield less than $125 million for current and future claimants.[292]

E. Claimants' likelihood of success

Next, Dr. Bates needed to discount the potential award against Garlock by the claimant's likelihood of success. To calculate this, Dr. Bates relied in the first instance on the history of mesothelioma verdicts against Garlock.[293] He observed that plaintiffs had different success rates against Garlock before 2001, between 2001 to 2005, and after 2005.[294]

[292] Tr. 2803:20-2804:24, 2823:5-10 (Bates).
[293] Tr. 2807:1-2808:1 (Bates).
[294] Tr. 2808:2-2809:2 (Bates); Bates Demonstrative Slides at 54 (GST-8005).



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Likelihood of a Plaintiff Verdict Against Garlock

Trial Years	Defense Verdicts	Plaintiff Verdicts	Total	% Plaintiff Verdicts	Information Regime
1990 to 2000	33	3	36	8%	Plaintiffs willingly espouse exposures to reorganized companies
2001 to 2005	17	15	32	47%	Some alternative exposures evidence withheld
2006 to 2010	13	2	15	13%	Some alternative exposures evidence withheld – trusts begin operation
All years	63	20	83	24%	

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In 36 trials prior to 2001, Garlock won at trial over 90% of the time. Plaintiff wins increased between 2001 and 2005, a change that Dr. Bates understood (based on discovery obtained in this case) as being related to plaintiffs withholding or strategically presenting evidence of their exposures to other companies' asbestos-containing products (see discussion in Part I *supra*).[295] But after 2005, Garlock's win rate increased again as it spent more on trials, experts, and investigation of claims, and paid a small number of larger settlements instead of going to trial.[296] Dr. Bates thus hypothesized that the approximately 8% likelihood of success that plaintiffs had in the 1990s best characterized plaintiffs' likelihood of success against Garlock when the jury has access to all information known or reasonably known to the plaintiff or his counsel.[297]

[295] Tr. 2809:3-19 (Bates).
[296] Tr. 2809:20-2810:15 (Bates).
[297] Tr. 2810:16-2811:2 (Bates).

Dr. Bates then had to test this hypothesis, again because cases that produced historical verdicts are not representative of the whole population of cases,[298] Dr. Bates tested his 8% hypothesis against the settlement data in order to determine that it was a conservative estimate of plaintiffs' likelihood of success.[299] Using the same Law and Economics model described above, Dr. Bates estimated the likelihood of success implied by each mesothelioma settlement Garlock entered into in the 2000s.[300] He populated the model with claimant characteristics (such as age), settlement amounts, estimated expected compensatory award amounts (based on estimated total potential verdict and estimated Garlock share), and estimated avoidable costs, and solved for expected likelihood of success.[301]

As described above, Dr. Bates found that, in the 2000s, the expected liability likelihood for the top 4% of cases was 17%, and for the other 96% of cases, was nil, resulting in an average liability likelihood of less than 1%.[302] This confirmed that Dr. Bates's use of an 8% average liability likelihood derived from verdict data was highly conservative and appropriate. This is because in Dr. Bates's estimate, the percentage was applied not only to cases that would have gone to trial in the tort system, but to all cases, including cases that would not have gone to trial because they had very little or no likelihood of success.

Dr. Bates's figure makes sense. His analysis shows that, as one would expect, plaintiffs who went to verdict tended to have among the very strongest cases against Garlock. When all cases are considered, the average likelihood of success should be much lower than Garlock's verdict record (where Garlock had considerable success, even in the 2000s).

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[298] Tr. 2807:1-2808:1 (Bates); *see also* Tr. 2738:16-2739:16 (Bates); *In re Chevron U.S.A., Inc.*, 109 F.3d at 1021 (cases selected for trial by parties not representative of larger pool).
[299] Tr. 2811:3-2813:5 (Bates).
[300] *Id.*
[301] *Id.*
[302] *Id.*

F. Estimation of pending claims

To estimate expected judgments arising from pending claims, Dr. Bates first used the Mesothelioma Claim Questionnaire ordered by the Court to determine the number of pending claimants who allege contact (direct, indirect, or bystander) with a Garlock asbestos-containing product.[303] These are the claimants who could (per Dr. Bates's first assumption) obtain a trial and potentially impose liability on Garlock.

As an initial matter, the PIQ process revealed that only approximately 4,000 of the approximately 6,000 potential claimants on the PIQ service list actually had pending mesothelioma claims.[304] The remaining 2,000 claimants reported that they did not have pending mesothelioma claims because their claims had already been dismissed against Garlock, were withdrawn, did not have Garlock exposure, were not mesothelioma claims, or were duplicate claims.[305]

Dr. Gallardo-Garcia's team then reviewed PIQ responses from the approximately 4,000 claimants with pending claims—all of whom had sued Garlock before the petition—to determine the number who alleged contact with Garlock asbestos-containing products. The PIQ required claimants to identify how they were exposed to a Garlock asbestos-containing product, but allowed claimants to answer the question by attaching documents, such as interrogatory answers and deposition transcripts.[306] Accordingly, Dr. Gallardo-Garcia's team collected all information from documents submitted in response to the PIQ concerning alleged contact with Garlock asbestos-containing products.[307] Because of the importance of determining how many claimants

[303] Tr. 2813:21-2815:14 (Bates).
[304] Tr. 2632:23-2634:4 (Gallardo-Garcia).
[305] *Id.*
[306] Tr. 2631:23-2632:22 (Gallardo-Garcia).
[307] Tr. 2634:25-2635:23, 2636:5-25, 2638:2-19 (Gallardo-Garcia).

alleged exposure to Garlock asbestos-containing products, Dr. Gallardo-Garcia subjected this process to extra rounds of quality control review.[308]

This study demonstrated that approximately 1,755 of the approximately 4,000 pending claimants did not allege contact with Garlock products—a precondition to proceeding to trial and final judgment.[309] Dr. Bates thus assigned a value of zero to those claims.[310]

For the remaining approximately 2,200 pending claims where the claimant does allege contact with a Garlock asbestos-containing product, Dr. Bates applied his estimated potential compensatory award and likelihood of success parameters.[311] He used claimant characteristics (such as age and jurisdiction) to estimate the total potential verdict, then calculated Garlock's potential share of the verdict and applied the 8% likelihood of success average.[312] Performing this calculation, Dr. Bates ultimately concluded that pending claimants could expect to obtain judgments of no more than $25 million.[313]

G. Estimation of future claims

To estimate expected judgments arising from future claims, Dr. Bates first used a model of the incidence of mesothelioma to determine the total number of future individuals who will allege contact with Garlock asbestos-containing products.[314] Dr. Bates used the latest iteration of the Nicholson model, developed by Bates White.

By way of background, Dr. Bates was part of the team at KPMG that developed the so-called "Nicholson-KPMG" model for the incidence of mesothelioma, upon which Dr. Rabinovitz

[308] Tr. 2644:23-2645:20 (Gallardo-Garcia).
[309] Tr. 2816:12-2817:14, 2927:14-2928:12 (Bates).
[310] *Id.*
[311] Tr. 2813:21-2815:14 (Bates).
[312] *Id.*
[313] Tr. 2823:5-10 (Bates).
[314] Tr. 2815:15-2816:11 (Bates).

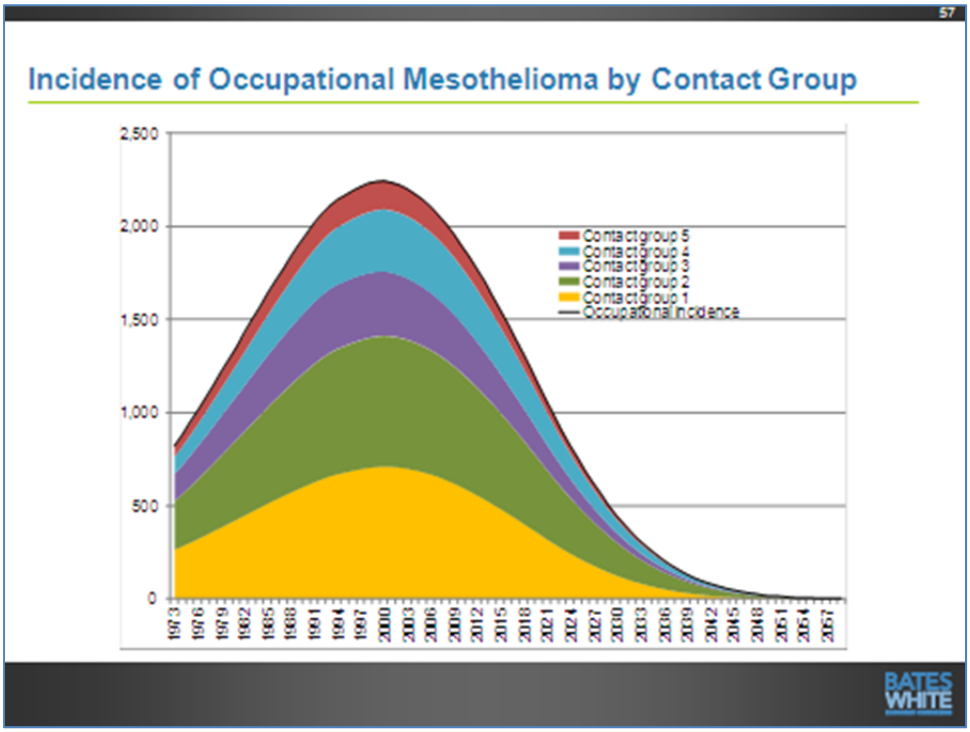
relies in this case and upon which Dr. Peterson has relied in previous engagements.[315] That version of the mesothelioma incidence model was developed in the early 1990s as an improvement on a model developed in the early 1980s. *See* W.J. Nicholson, George Perkel, and Irving J. Selikoff, "Occupational Exposure to Asbestos: Population at Risk and Projected Mortality—1980-2030," *American Journal of Industrial Medicine* 3 (1982) (the "Nicholson model"). The Nicholson model estimated the future incidence of mesothelioma by estimating exposures to asbestos experienced by workers in certain occupations and industries during the 1940s, 1950s, 1960s, and 1970s, and used those exposure estimates to generate the expected incidence of mesothelioma arising from those occupations and industries.[316] Dr. Bates when he was at KPMG improved the Nicholson model (in consultation with Dr. William Nicholson), using newly available data from the National Cancer Institute, updated exposure estimates for certain populations of workers, and other sources.[317]

For this engagement, Dr. Bates used an incidence model that improves further on the Nicholson-KPMG model.[318] The Bates White model includes exposed populations far beyond the exposed populations that Dr. Nicholson used (including bystander and indirect exposures), and also incorporates recent epidemiological research to model the portion of nationwide incidence (as measured by National Cancer Institute data) that is unrelated to exposure to asbestos.[319]

Dr. Bates used the incidence model to calculate the portion of the future total incidence of mesothelioma in the United States that will arise from each of the five contact groups identified

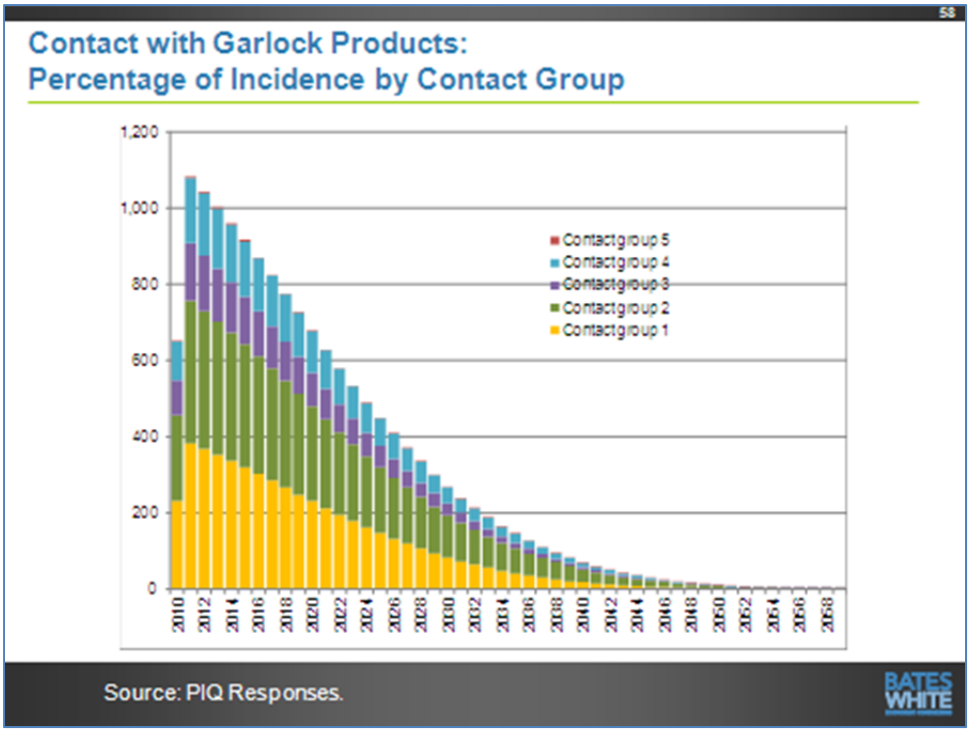
[315] Tr. 2716:4-2720:3 (Bates); Tr. 4174:13-14 (Rabinovitz); Mark A. Peterson, Armstrong World Industries, Inc. Projected Liabilities for Asbestos Personal Injury Claims at 27-28 (GST-6581).
[316] Tr. 2714:8-2716:3 (Bates).
[317] Tr. 2716:4-2720:3 (Bates); *see also* Tr. 4174:25-4175:18 (Rabinovitz) (admitting that Nicholson-KPMG improved upon Nicholson model).
[318] Tr. 2720:4-10 (Bates).
[319] Tr. 2725:18-2727:1, 2818:15-2819:23 (Bates).

by Mr. Henshaw, which gave him the total number of persons diagnosed with mesothelioma who could have been in contact with gaskets.[320]



Then, because Garlock was only one of many gasket manufacturers, he estimated the portion of those individuals who will allege contact with Garlock gaskets by using the percentage of pending claimants who alleged contact with Garlock gaskets through the PIQ.[321]

[320] Tr. 2815:15-2816:11 (Bates); Bates Demonstrative Slides at 57 (GST-8005).
[321] Tr. 2819:24-2821:13, 2852:14-2854:1 (Bates); Bates Demonstrative Slides at 58 (GST-8005).



This was a conservative step because pending claimants took the affirmative step of suing Garlock, and are therefore more likely to have had Garlock contact than average future individuals diagnosed with mesothelioma.[322] This calculation resulted in Dr. Bates estimating that over half of the future incidence from individuals who worked in the Henshaw occupations and industries will assert contact with Garlock asbestos-containing products.[323]

Importantly, Dr. Bates did not reduce his future claims estimate to account for the fact that not all future individuals with Garlock contact will actually sue Garlock.[324] His future claims estimate incorporates all persons with Garlock contact who will develop mesothelioma, regardless of whether they actually sue Garlock or assert claims—again, providing a conservative upper bound for the Court to use.[325]

[322] *Id.*
[323] Tr. 2819:24-2822:3 (Bates).
[324] *Id.*
[325] *Id.*

After identifying the number of future individuals who can allege contact with Garlock products, Dr. Bates valued these individuals' claims in the same way he valued pending claims, using his estimates of potential compensatory awards, Garlock's share of such awards, and claimants' likelihood of success.[326] He then discounted to present value using the Congressional Budget Office's (CBO's) estimates for long-term inflation and risk free interest rates, which are commonly used in the asbestos estimation context as well as in the context of other long term forecasts.[327] Dr. Bates determined that the judgments future claimants could expect to obtain are less than $100 million in the aggregate (net present value).[328]

Thus, pending and future claimants in the aggregate could expect to obtain less than $125 million in judgments.

H. Dr. Bates based his estimate on conservative assumptions

Dr. Bates's ultimate opinion was that current and future mesothelioma claimants could expect to recover significantly less than $125 million in judgments, because across all cases, claimants' average likelihood of success is much less than the 8% that Dr. Bates used for his estimate.[329] Dr. Bates's bounding estimate is a conservative figure for the Court to use for a number of additional reasons discussed above:

- Dr. Bates assumed (consistent with assertions by the Committee and FCR) that all cases where a claimant alleges contact with Garlock asbestos-containing products would go to trial, contrary to the medical and industrial hygiene evidence presented by Debtors;

[326] Tr. 2823:11-20 (Bates).
[327] Tr. 2774:17-2776:2, 4786:11-4787:6 (Bates).
[328] Tr. 2823:11-20 (Bates).
[329] Tr. 2774:4-16 (Bates).

- Dr. Bates assumed that at such trials, claimants' causation evidence would not be excluded—consistent with assertions by the Committee and FCR, and contrary to the medical and industrial hygiene evidence presented by the Debtors;
- Dr. Bates assigned liability shares only to those companies where claimants identified exposure through discovery in this case—not the number of asbestos exposures that claimants actually likely experienced (in the hundreds or thousands);
- Dr. Bates assigned equal liability shares to each of the 36 companies so identified, despite the admission by experts for the Committee that insulation and other friable products included in that 36 produced exposures several orders of magnitude higher;
- Dr. Bates used a likelihood of plaintiff success derived from Garlock's verdict history, which overstates plaintiffs' likelihood of success, as indicated by the likelihood of success implied by Garlock's settlement history and the Law and Economics model;
- Dr. Bates assumed that an extremely high percentage of future mesothelioma incidence will allege exposure to Garlock products—more than half of the mesothelioma diagnoses arising from Mr. Henshaw's contact groups—despite the fact that Garlock was only one of many companies that manufactured asbestos-containing gaskets;
- Dr. Bates did not apply a deduction to account for the fact that not all future individuals diagnosed with mesothelioma who had contact with Garlock gaskets will assert a claim.

Dr. Bates's estimate is therefore a safe and reliable one for the Court to use.

I. Drs. Rabinovitz and Peterson did not estimate any of the parameters relevant to expected judgments

Not only did Drs. Rabinovitz and Peterson not establish that settlements have anything to do with expected judgments: they also failed to estimate any of the factors relevant to expected judgments.

Dr. Rabinovitz admitted she

- Has not analyzed the total damages that mesothelioma claimants might recover in cases against Garlock;[330]
- Has no opinion on the average number of responsible parties in a case against Garlock;[331]
- Has no opinion on the aggregate amount of money a typical mesothelioma claimant against Garlock will recover from Trusts;[332]
- Has no opinion on the typical claimant's likelihood of succeeding in a case tried against Garlock;[333] and
- Has not attempted to measure the number of persons whose mesothelioma was potentially caused by Garlock's product;[334]

Likewise, Dr. Peterson admitted he

- Has not studied or attempted to determine the total damages current or future mesothelioma claimants might expect to recover from all sources;[335]
- Has no opinion about Garlock's share of a mesothelioma claimant's damages, including for any particular case, pending or future;[336]

[330] Tr. 4366:7-11 (Rabinovitz).
[331] Tr. 4364:23-4365:1, 4366:12-22 (Rabinovitz).
[332] Tr. 4367:4-10 (Rabinovitz).
[333] Tr. 4366:23-4367:3 (Rabinovitz).
[334] Tr. 4366:1-6 (Rabinovitz).
[335] Tr. 3973:20-25 (Peterson).
[336] Tr. 3974:1-10 (Peterson).

- Has no opinion on the number of parties that could be found responsible in current and future claims against Garlock;[337]
- Has not studied the number of Trusts that claimants against Garlock will seek recovery from;[338]
- Has not calculated the aggregate amount of money that an average mesothelioma claimant against Garlock will recover from Trusts;[339] and
- Does not have the ability to estimate the number of persons whose mesothelioma may have been caused or contributed to by a Garlock product.[340]

Thus, the Committee and FCR provided no evidentiary basis upon which the Court could find an estimate of allowed claims different from Dr. Bates's.

J. Criticisms of Dr. Bates's estimation of the parameters relevant to expected judgments are unfounded

Rather than present the Court with different parameters for the factors relevant to expected judgments, Drs. Rabinovitz and Peterson (and other witnesses for the Committee and FCR) criticized Dr. Bates's calculations. None of these criticisms have merit.

1. Criticism of estimate of total potential judgments

Dr. Rabinovitz criticized Dr. Bates on the ground that in the verdicts he used to calculate total potential judgments, there were only 24 Garlock verdicts, and she also objected to his inclusion of non-Garlock verdicts in the pool of 367 that he used.[341]

But as Dr. Bates explained, the total potential compensatory award does not depend on the particular defendant, but rather on claimant characteristics such as age, life status,

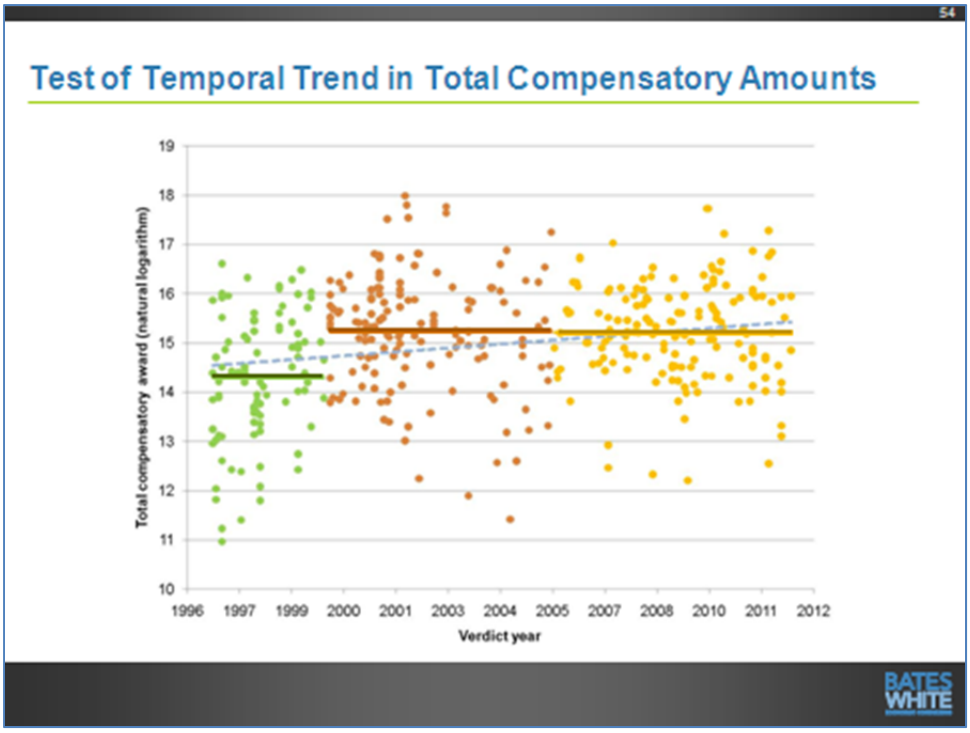
[337] Tr. 3976:7-3977:18 (Peterson).
[338] Tr. 4063:2-4063:10 (Peterson).
[339] Tr. 3975:19-3976:6 (Peterson).
[340] Tr. 3973:5-19 (Peterson).
[341] Tr. 4215:19-4216:1 (Rabinovitz).

jurisdiction, and economic damages factors such as lifetime earnings.[342] Using a large pool of publicly reported mesothelioma verdicts made the estimate of total potential compensatory awards more reliable and certain, not less; indeed, Dr. Bates also tested his estimate using over 1,200 non-asbestos wrongful death verdicts, which confirmed its reliability.[343]

Dr. Peterson criticized the regression Dr. Bates applied.[344] But as Dr. Bates explained, he needed a regression to correct for the upward bias that exists in observed verdicts, which are an unrepresentative sample that tends to contain plaintiffs who are younger, more likely to be alive at trial, and from higher value jurisdictions.[345] Dr. Bates used confidence intervals to ensure that his regression was reliable.[346]

Dr. Peterson also criticized Dr. Bates for failing to take into account an alleged trend of seven percent annual increase in mesothelioma verdicts.[347] But Dr. Bates demonstrated this trend does not exist. Mesothelioma verdicts have not continuously increased over the past two decades. Instead, there was a one-time step up in verdict values between the late 1990s and early 2000s.[348] In contrast, verdict values from the early to late 2000s are statistically indistinguishable.[349] By failing to recognize this, Dr. Peterson presented the Court with a non-existent trend. The following graph shows the actual trend: a step-up, not a steady increase:[350]

[342] Tr. 4807:14-23 (Bates).
[343] Tr. 4808:1-13 (Bates).
[344] Tr. 3934:9-3938:4 (Peterson).
[345] Tr. 4806:22-4807:13 (Bates).
[346] *Id.*
[347] Tr. 3934:9-3938:4, 3939:3-21 (Peterson).
[348] Tr. 4809:11-4811:15 (Bates).
[349] *Id.*
[350] Bates Rebuttal Demonstrative Slides at 54 (GST-8026).



2. Criticism of estimate of Garlock's potential share

Remarkably, Dr. Peterson opined that the average number of responsible parties in a mesothelioma case against Garlock is not thirty-six, but two: Garlock and a single other unspecified defendant.[351] He said Dr. Bates should have used this instead of the 36 responsible parties that Dr. Bates estimated using Dr. Gallardo-Garcia's data.

Dr. Peterson's opinion does not make sense. Dr. Peterson has testified that Garlock was a minor producer of asbestos products that did not make a significant product and was not a significant defendant.[352] He testified in this case that "in the scheme of all of the asbestos-containing products, gaskets are not the central source of asbestos exposures, I think there's no question about that."[353] And in the *Federal Mogul* estimation trial, he testified that an asbestos-containing gasket manufactured by Flexitallic almost never released asbestos, so that even

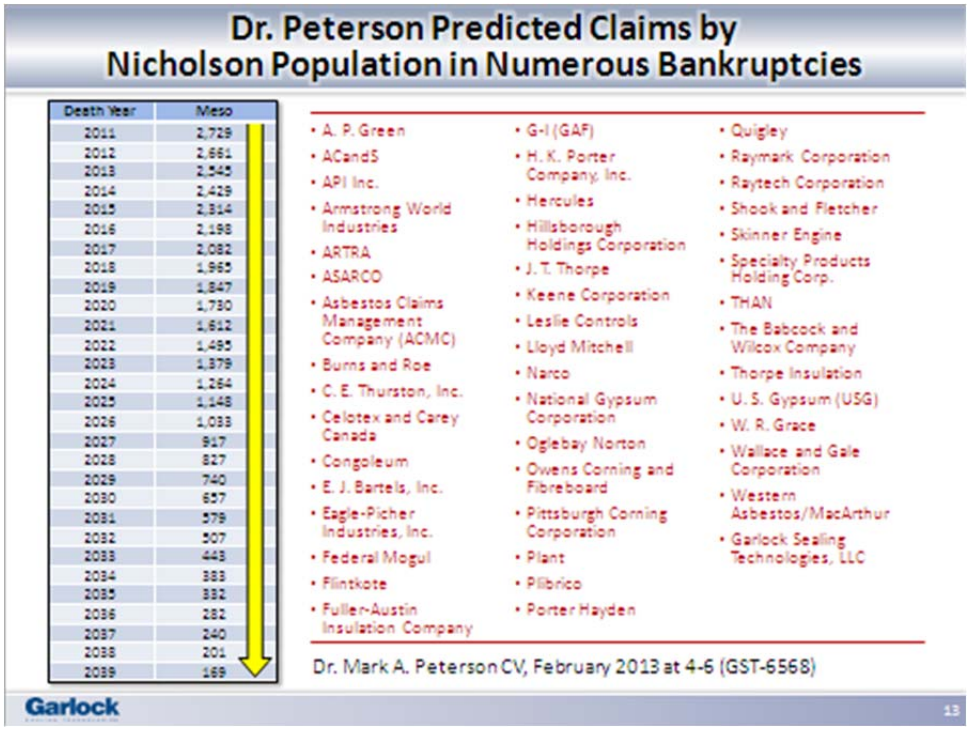
[351] Tr. 3921:14-3923:14, 3974:21-3975:12 (Peterson).
[352] Tr. 4036:1-21, 4038:18-4039:20 (Peterson).
[353] Tr. 4038:18-4039:20 (Peterson).

though plaintiffs identified the product frequently, they had difficulty proving causation.[354] Mr. Paul Hanly, another expert for the Committee, likened Garlock to Flexitallic.[355] To think that Garlock could be one of two responsible parties, on average, is unthinkable.

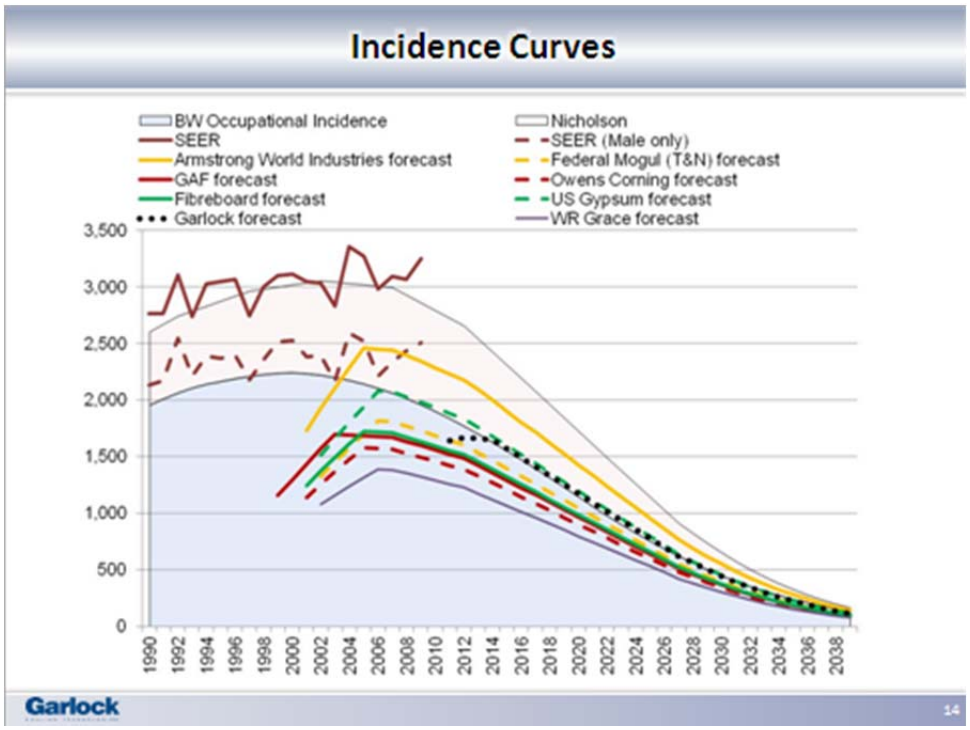
That is especially the case given the number of other companies that face liability in asbestos litigation. Dr. Peterson testified that thousands of companies have been defendants in asbestos litigation, with 100 or 200 companies heavily involved.[356] Drs. Peterson and Rabinovitz each have estimated liabilities for dozens of companies.[357] One plaintiff law firm on its website touts 600 current viable defendants—which does not include reorganized defendants and Trusts.[358]

Dr. Peterson has himself estimated the liabilities of over 40 companies in bankruptcy cases. In each such case, he estimated that the company was responsible for a large portion of the Nicholson incidence curve, which predicts the total number of occupationally related mesothelioma deaths in the United States each year.[359]

[354] Tr. 4040:18-4041:20 (Peterson).
[355] Tr. 3795:25-3796:3, 3796:18-20, 3813:8-14 (Hanly).
[356] Tr. 3852:24-3853:1 (Peterson).
[357] Tr. 4816:24-4817:12 (Bates).
[358] Tr. 4816:8-23 (Bates).
[359] Tr. 4054:20-4058:20, 4073:18-4074:18 (Peterson); Peterson Cross-Examination Demonstrative Slides at 13 (GST-8014).



The following graph shows the percentage of the Nicholson incidence that Dr. Peterson predicted would sue certain major asbestos defendants:[360]



[360] Peterson Cross-Examination Demonstrative Slides at 14 (GST-8014).

Dr. Peterson admitted that many of these forty companies' products were used in the same occupations and industries where Garlock's products were used, and that "asbestos claimants tend to be exposed to lots of different companies' products."[361] In particular, "people that were exposed to Garlock were exposed to other products often."[362] He further admitted it is reasonable to expect that many other defendants, including Trusts, will be paying the same claims asserted against Garlock.[363]

Thirty-six responsible companies on average is a conservative estimate, given the industrial, asbestos-laden contexts in which Garlock's asbestos-containing products were used and the large number of companies that have responsibility if a jury determines that Garlock has responsibility.[364] Dr. Bates's use of equal liability shares is also conservative and reasonable, given the exposure estimates for Garlock gaskets versus those for other products.[365]

Dr. Peterson's only justification for assigning Garlock half the liability is that in the eighteen cases where Garlock suffered adverse verdicts, there were on average two parties assigned liability. But Dr. Bates explained why it would be erroneous to treat that sample of 18 as representative or reliable. In the first place, verdicts are neither random nor representative of the larger population of cases, as the work by Debtors' expert Professor Priest showed more than twenty years ago.[366] *See also In re Chevron U.S.A., Inc.*, 109 F.3d at 1019-20. In particular, in Garlock's case, verdicts were cases where Garlock was strategically targeted, including through non-disclosure of evidence, as demonstrated in discovery in this case (see discussion *supra* Part

[361] Tr. 4062:21-4063:1 (Peterson).
[362] Tr. 4073:18-4074:18 (Peterson).
[363] Tr. 4064:24-4065:13 (Peterson).
[364] Tr. 4814:10-14 (Bates).
[365] Tr. 4813:17-25 (Bates).
[366] Tr. 2738:16-2739:6 (Bates); George L. Priest and Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. Legal Stud. 1 (Jan. 1984) (GST-0993).

I).[367] The number of parties assigned liability in those cases is thus not representative of the average number of responsible parties in a case against Garlock.[368] By contrast, Dr. Bates's analysis is representative and reliable, as it is founded on Dr. Gallardo-Garcia's data carefully collected across a spectrum of nearly 1,300 cases.

Finally, Dr. Peterson criticized how Dr. Bates calculated 36 shares, arguing that on the basis of Dr. Bates's data, the figure should have been 23 instead.[369] Dr. Bates explained that, on the contrary, Dr. Peterson's point would hold true only if Dr. Bates had used the mean number of shares instead of the median, which Dr. Peterson erroneously believed Dr. Bates had done.[370] Dr. Peterson incorrectly believed that Dr. Bates used an average, but he testified twice that he used a median for both tort defendants and Trust parties.[371]

Dr. Rabinovitz had no direct criticism of Dr. Bates's number of shares. For example, she did not study and had no opinion on whether it is reasonable to suppose that Garlock might share liability with 22 Trusts on average, and did not have any opinion on the average number of responsible parties in a case against Garlock.[372]

At the end of her direct testimony, however, she discussed adjustments to Dr. Bates's parameters, including arbitrary adjustments to the likelihood of success and number of responsible co-defendants and Trusts, and the effect such adjustments would have on his estimate if implemented.[373] She advanced no hypothesis for why those adjustments would be proper, presented no data supporting any such hypothesis, and provided no statistical analysis

[367] Tr. 4813:17-25 (Bates).
[368] Under Dr. Peterson's theory, Garlock would be strategically targeted in all cases in which it is named—which Dr. Peterson estimates would be more than 60% of the mesothelioma cases in the United States. Peterson Demonstrative Slides at 35 (ACC-824). This is implausible.
[369] Tr. 3915:6-3919:23 (Peterson).
[370] Tr. 4817:20-4820:15 (Bates).
[371] Tr. 2947:25-2948:16 (Bates).
[372] Tr. 4364:23-4365:6, 4366:12-22 (Rabinovitz).
[373] Tr. 4220:24-4222:9 (Rabinovitz).

showing that the data support such a hypothesis. For these reasons, her testimony should be disregarded. *See Bynum*, 3 F.3d at 773; *Buckman*, 893 F. Supp. at 554.

3. "Trust claims and ballots are not evidence of exposures"

On a related point, the Committee called Mr. James Patton to testify that Dr. Bates should not assume a claimant who casts a ballot or files a Trust claim knows he was exposed to the product of the debtor. Mr. Patton had no independent opinion about the number of companies to whose products a mesothelioma claimant alleges exposure.[374] And undisputed facts demonstrated that Mr. Patton's criticism does not have merit.

Mr. Patton articulated two reasons why Trust claims may not be evidence of exposure: the claim may rely on a presumed site, or the claim may be deferred or deficient.[375] But:

- Mr. Patton admitted that Trust distribution procedures ("TDP") commonly contain a provision requiring the claimant to demonstrate meaningful and credible exposure to the debtor's products.[376] Debtors introduced numerous examples of these TDP, summarized in detail in the Appendix.
- He admitted that Trusts generally apply exposure criteria that are at least as stringent as the criteria historically applied by the debtor before its bankruptcy filing.[377] Mr. Patton could not name an example of a debtor that before its bankruptcy paid claimants who did not allege they were exposed to the debtor's products.[378]
- Mr. Patton admitted that individuals who rely on a presumed site would most assuredly be able to prove exposure to the debtor's product if required to do so.[379] Trusts presume

[374] Tr. 3726:1-12 (Patton).
[375] Tr. 3709:18-3710:20 (Patton).
[376] Tr. 3726:19-3729:13 (Patton).
[377] Tr. 3730:12-3731:5, 3731:20-3732:4, 3732:8-3733:5 (Patton); *see also* Tr. 4065:14-4066:12 (Peterson).
[378] Tr. 3752:11-17 (Patton).
[379] Tr. 3736:24-3737:21 (Patton).

that people who rely on a presumed site were exposed to the product, because presumed sites are ones where the company had been paying claims, acknowledged it had asbestos-containing materials present, and has been held liable.[380] If the Trust makes that inference, it is unclear why it was improper for Dr. Bates to infer the same thing.

- In addition, Mr. Patton admitted there are many ways for claimants to meet Trusts' exposure requirements, including through personal affidavits or affidavits of co-workers.[381] He does not know the percentage of claimants who use these other methods as opposed to the presumed site option upon which he rests his criticism.[382]
- Further, though some claims may be deferred or deficient, the vast majority of mesothelioma claims filed against Trusts are paid, indicating they had exposure evidence. Mr. Patton admitted that the only data available—the DCPF data—indicated that 62.6 percent of the 54,000 Trust claims submitted by settled Garlock mesothelioma claimants were approved and have been paid or will be paid.[383]
- In addition, claims that were deferred or deficient as of the date Debtors received that data may be supplemented and eventually paid, and may have had exposure evidence when originally submitted, in proportions unknown to Mr. Patton.[384]

In short, Mr. Patton provided no basis to doubt Dr. Bates's conclusion that persons filing claims against Trusts are alleging they were exposed to the debtor's asbestos-containing products.

With respect to ballots (which made up only four of the twenty-two debtor exposures that Dr. Bates estimated), Mr. Patton admitted that:

[380] Tr. 3737:22-25, 3738:1-3739:5 (Patton).
[381] Tr. 3751:15-20 (Patton).
[382] Tr. 3751:21-3752:3 (Patton).
[383] Tr. 3757:5-18 (Patton).
[384] Tr. 3758:14-3759:8 (Patton).

- A claimant casting a ballot must have a good faith basis to believe he was exposed to the debtor's product.[385] And persons who vote are identifying themselves as creditors in the case.[386]
- In the *Owens Corning* and *Pittsburgh Corning* cases in 2003, debtor's counsel and the court stated that voting claimants had to certify they had meaningful and credible exposure to the debtor's products, in rejecting insurer contentions that exposure certifications were not strong enough.[387]
- Mr. Patton presented no evidence showing that the rules were any different in subsequent bankruptcy cases. Mr. Patton did not dispute that twenty-two of the twenty-three ballotings upon which Dr. Bates relied took place after the 2003 disputes, and agreed that if, in subsequent cases, there had been a weaker exposure certification, insurers likely would have objected.[388]

Debtors introduced numerous exhibits showing that voting claimants certified they were exposed to the debtor's products under penalty of perjury, as summarized in detail in the Appendix. Against this voluminous evidence, Mr. Patton appeared to be asserting merely that a ballot is not a jury finding of liability—a point no-one disputes and that Dr. Bates did not assume.[389]

Thus, Mr. Patton did not undermine the reasonableness of Dr. Bates's reliance on Trust claims and ballots as evidence of allegations of exposure. Nor did he provide any basis to doubt Dr. Bates's ultimate conclusion about the number of products to which a typical claimant alleges exposure.

[385] Tr. 3693:6-9, 3697:8-11, 3759:12-19, 3774:11-12 (Patton).
[386] Tr. 3764:20-3766:3 (Patton).
[387] Tr. 3770:24-3773:17, 3776:24-3777:17 (Patton).
[388] Tr. 3778:7-3779:4 (Patton).
[389] Tr. 3774:7-10, 3789:2-9 (Patton).

4. "Estimated judgments do not match observed verdicts"

Next, Dr. Peterson criticized Dr. Bates because his estimates did not match the shares assigned to Garlock in the eighteen adverse verdicts against Garlock in its history.[390]

Dr. Bates explained that this was an inappropriate comparison, for two reasons:

- Tried cases are not representative of average cases, as Professor Priest's article established more than twenty years ago;[391] and
- Dr. Bates estimated future judgments in fair trials with known information regarding plaintiffs' exposures to asbestos products available to the jury, a condition that was not met in past verdicts against Garlock.[392]

Thus, the eighteen observed verdicts against Garlock are not an appropriate measure of the validity of Dr. Bates's estimates, which are independently confirmed using valid statistical methods, including confidence intervals to bound variability.

5. Criticism of likelihood of success estimate

Dr. Peterson also criticized Dr. Bates's estimate of likelihood of success. But Dr. Peterson admitted that it is extremely difficult for plaintiffs to prove causation against a gasket manufacturer.[393]

Further, Dr. Bates rigorously tested his hypothesis that plaintiffs' win rate in the 1990s was most characteristic of average claims against Garlock when all known exposures are disclosed. Dr. Bates used the standard Law and Economics model and Garlock's settlements to conclude that, across all of the thousands of cases settled in the 2000s, the parties' shared expectation regarding average liability likelihood was actually less than one percent, with a

[390] 3927:17-3928:1 (Peterson)
[391] 2738:16-2739:6, 2960:23-2961:9 (Bates); *see also In re Chevron U.S.A., Inc.*, 109 F.3d at 1019-20.
[392] 2969:5-16, 2970:15-2971:2 (Bates)
[393] 4040:18-4041:20 (Peterson)

confidence interval from 0.3 to 1 percent.[394] Dr. Bates's test was so sensitive, it would have been capable of detecting a 0.035 percent liability likelihood (if it existed).[395]

Neither Dr. Peterson nor Dr. Rabinovitz provided any evidence to rebut Dr. Bates's statistical test of his liability likelihood estimate.

6. Criticism of treatment of pending claims not alleging contact with Garlock's products

Dr. Rabinovitz criticized Dr. Bates for concluding that pending claimants who did not allege exposure to Garlock asbestos-containing products in response to the PIQ could not obtain a trial and expose Garlock to potential liability.[396]

Yet a claimant who does not allege exposure cannot proceed to trial and cannot expose Garlock to potential liability. Even Dr. Peterson admitted that he was not aware of any case that has proceeded to trial against Garlock on a non-exposure based theory, and that "there would be diminishingly few" cases that would go to trial against Garlock on such a theory.[397] Given this, Dr. Bates's assumption was entirely reasonable.

Dr. Bates also explained that there were two ways to treat pending claimants who did not allege contact with Garlock products in a response to the PIQ ("non-responses"): (1) as not having a basis to assert contact, or (2) as missing at random.[398] He determined it would not be plausible to assume that non-responses were missing at random, and thus treated persons who did not submit a PIQ alleging contact as not having a basis to do so.[399] In any event, Dr. Bates tested the sensitivity of this assumption, and determined that if he *did* treat non-responses as

[394] Tr. 4823:9-19 (Bates).
[395] Tr. 4825:5-4826:12 (Bates).
[396] Tr. 4215:10-18 (Rabinovitz).
[397] Tr. 3978:15-3979:15 (Peterson).
[398] Tr. 2940:25-2942:9 (Bates).
[399] *Id.*

missing at random, it would increase his calculation by 5 or 6 percent, and would not change his ultimate opinion that expected judgments are less than $125 million.[400]

7. Criticism of Dr. Bates's incidence model

Though Dr. Rabinovitz relies on the Nicholson-KPMG model that Dr. Bates developed in the 1990s, she criticized Dr. Bates's improved incidence model. Dr. Rabinovitz accused Dr. Bates of incorrectly eliminating one-third of future incidence on the basis of a so-called "idiopathic defense" to liability.[401]

In fact, this is not what Dr. Bates did. As Dr. Bates explained, his incidence model improves on the Nicholson-KPMG model, in part by incorporating recent epidemiological research to model the portion of nationwide incidence (as measured by National Cancer Institute data) that is unrelated to exposure to asbestos.[402] The "one-third" that Dr. Rabinovitz accuses Dr. Bates of eliminating consists of persons developing mesothelioma who were not exposed to asbestos—much less occupationally exposed—and thus could never allege they had contact with Garlock asbestos-containing products so as to expose Garlock to liability.

Dr. Peterson also in passing criticized Dr. Bates's incidence model, claiming that only the Nicholson model has been confirmed using SEER data. In fact, Dr. Bates's model is calibrated using SEER data from the National Cancer Institute.[403] In addition, Dr. Peterson's opinion about the Nicholson model is incorrect. Dr. Peterson admitted that Dr. Nicholson was not trying to estimate the incidence of mesothelioma in the general population, only the incidence among people occupationally exposed in certain industries and occupations with meaningful

[400] *Id.*
[401] Tr. 4218:9-4219:8 (Rabinovitz).
[402] Tr. 2725:18-2727:1, 2818:15-2819:23 (Bates).
[403] Tr. 2725:18-2727:1 (Bates).

exposure.[404] Thus, convergence with SEER—which does measure total nationwide incidence—in fact disproves the validity of the Nicholson forecast. When confronted with this fact, Dr. Peterson had no response, simply stating that "I don't really care, because I'm not interested in what was in Dr. Nicholson's mind."[405] But if Dr. Nicholson's incidence model did not measure what Dr. Nicholson intended to measure (occupationally related mesotheliomas, not total mesotheliomas in the United States), it is not scientifically valid and cannot be used as a basis to criticize Dr. Bates. *See* Tr. 4236:20-23 (Heckman) ("[I]t's important to understand and frame very clearly what the purpose of the forecast is, what the intent is, and what the environment is envisioned to be for which the forecast is applicable.").

8. Criticism of not accounting for exposures to Garlock asbestos-containing products after 1979

During the trial, Dr. Bates was criticized for not considering exposures to Garlock asbestos-containing products after 1979. First, neither Dr. Peterson nor Dr. Rabinovitz estimated the contribution that such exposures could make to future incidence, as the Nicholson and Nicholson-KPMG incidence models they used also do not incorporate post-1979 exposures.[406]

In any event, Dr. Bates tested the sensitivity of his forecast to this issue using his incidence model. He calculated that hypothetical exposure to gaskets from 1979 to 2000, even assuming the linear dose response curve advocated by plaintiff attorneys, generates only 75

[404] Tr. 4067:24-4068:10 (Peterson); *see also* William J. Nicholson, et. al., *Occupational Exposure to Asbestos: Population at Risk and Projected Mortality – 1980-2030*, American Journal of Industrial Medicine 260-70 (1982) (GST-1311).
[405] Tr. 4072:7-4073:1 (Peterson).
[406] KPMG Peat Marwick Policy Economics Group, "Estimation of Company Liability Personal Injury," Vol. 1 at 63 (1992) (GST-1298); Nicholson, William J., et. al., *Occupational Exposure to Asbestos: Population at Risk and Projected Mortality – 1980-2030*, American Journal of Industrial Medicine 259, 275 (1982) (GST-1311).

additional cases of mesothelioma—0.2 percent of the total incidence—and has no material effect on his forecast.[407]

9. Criticism of discount rate

Dr. Peterson erroneously asserted that Dr. Bates applied a discount rate to his forecast that contained risk.[408] In fact, Dr. Bates testified numerous times (and made clear in his report) that he applied CBO's risk free discount rate, as the financial expert for the FCR (Mr. Radecki) confirmed one week before Dr. Peterson testified.[409]

The financial experts for the FCR and Committee, Mr. Radecki and Mr. McGraw, both criticized Dr. Bates's use of a discount rate derived from CBO forecasts. At trial, Mr. Radecki argued Dr. Bates's rate was inappropriate because it was drawn from a 75-year CBO forecast, whereas the weighted average of Dr. Bates's estimate is under ten years, meaning Dr. Bates should have used shorter-term data.

But Mr. Radecki admitted that the CBO report he relied upon for his inflation rate—a 10-year forecast that "focused on those near-term rates"—had discount rates essentially identical to those from the 75-year CBO report that Dr. Bates used.[410] The real discount rate Dr. Bates used was approximately three percent, right between the 2.6 and 3.6 percent used by CBO in the report upon which Mr. Radecki relied.[411] Thus, Mr. Radecki's criticism had no merit, as judged by his own reliance materials.

Moreover, the CBO rates that Dr. Bates used are exactly the same source that Dr. Rabinovitz has relied upon in numerous previous engagements (as discussed in more detail in Subsection V.B.6 below). As Dr. Rabinovitz put it in the *Owens Corning* case, "These rates are

[407] Tr. 2817:25-2818:14, 2997:18-2999:9, 4814:15-21 (Bates).
[408] *See* Tr. 3954:21-3955:11, 4100:18-23 (Peterson).
[409] Tr. 2774:17-2776:2, 4786:11-4787:6 (Bates); Tr. 1358:24-1359:3 (Radecki).
[410] Tr. 1359:7-1360:15, 1370:16-1372:2, 1372:8-1372:16, 1373:2-7 (Radecki).
[411] Tr. 1373:2-7 (Radecki).

based on an analysis of the long-term relationship between rates of inflation and rates of return on medium to long-term U.S. government securities and are taken from the projections made by the Congressional Budget Office."[412] It was entirely appropriate for Dr. Bates to use these rates in discounting his future claims estimate, for the same reason.

Mr. McGraw criticized Dr. Bates because he used CBO's constant discount rate projections, instead of calculating a separate discount rate for each year of his forecast.[413] But Dr. Bates's use of CBO's rates were reasonable, as CBO's use of those constant rates in its forecasts demonstrates—both in the report relied on by Dr. Bates and the report relied on by Mr. Radecki that had only a 10-year term. Mr. Radecki admitted that "I think the CBO's rates are generally well-respected and reliable. It's a source that's considered objective and nonpartisan."[414] Furthermore, as discussed above, Dr. Rabinovitz's use of this source in her prior work likewise demonstrates the reasonableness of relying on CBO's rates.[415]

10. Criticism of consistency with pre-petition expenditure forecasts

Dr. Rabinovitz accused Dr. Bates of generating an estimate that produces "results which are completely different than what actually happened over the ten years that precede the bankruptcy."[416]

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[412] Rabinovitz Report, Owens Corning (Oct. 15, 2004) at 15 n.16 (GST-6591); *see also* Rabinovitz Report, Fibreboard (October 15, 2004) at 16 n. 16 (GST-6591); Rabinovitz Report, NARCO (April 24, 2006) at 12 (GST-6590) (real discount rate 3%); Rabinovitz Report, ASARCO (February 28, 2007) at 13 (GST-6585) (real discount rate 3%); Tr. 1374:2-1375:6 (Radecki);

[413] Kenneth McGraw, Rebuttal to the Report of Charles E. Bates, PhD ("McGraw Report") at ¶¶ 3, 5, 8 (GST-0983). Mr. McGraw did not testify at trial, but his report and deposition testimony have been admitted into evidence pursuant to stipulation and order.

[414] Tr. 1347:19-23 (Radecki).

[415] Nor does Mr. McGraw's criticism have a material impact on Dr. Bates's forecast. Mr. McGraw states in his report that if his criticism were heeded, Dr. Bates's forecast would increase by seventeen percent. McGraw Report at ¶ 10. Seventeen percent of $125 million is about $21 million—an amount that is not material given the amount in dispute between Debtors and the Committee and FCR.

[416] Tr. 4214:24-4215:1 (Rabinovitz).

Dr. Rabinovitz presented no data or analysis supporting this contention, only her bare opinion, which is not competent evidence. *See Bynum*, 3 F.3d at 773; *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) ("[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert.").

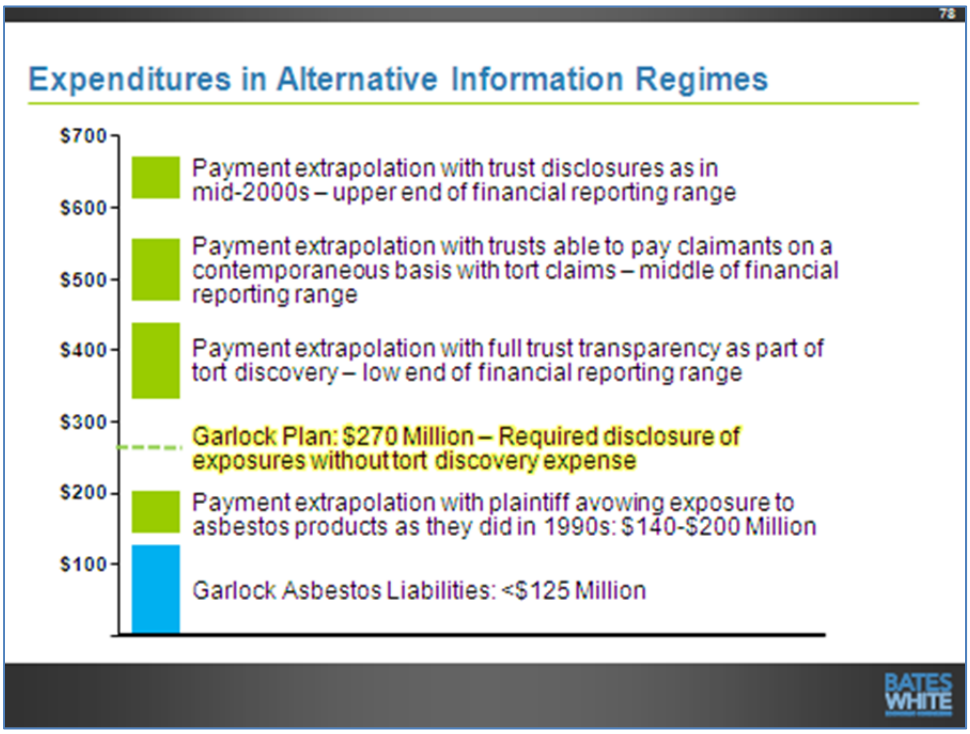
And in fact, Dr. Bates showed that his estimate of expected judgments is consistent with his pre-petition estimates of Garlock's expenditures (used by EnPro in financial reporting). The pre-petition estimates included non-mesothelioma disease claims, only covered ten years, and were not reduced to net present value.[417] When Dr. Bates limited his pre-petition estimate to mesothelioma claims, extended it for the full forecasting period in this case, and discounted it to present value, those forecasts yield a range of possible scenarios between $330 million (low end of reporting range) and $670 million (high end of reporting range).[418]

Dr. Bates explained that this range is consistent with his estimate of expected judgments of less than $125 million. As established in Part II above, expenditures (settlements) are different from expected judgments. Under the economic model used by Dr. Bates, any expenditure estimate will be greater than expected judgments, because Garlock would pay more than the expected judgment to avoid even higher costs of litigating every case to final judgment. [419] Under the scenario assumptions, at the low end of the range, plaintiffs identify all exposures known to them, decreasing Garlock's defense costs and settlements, while at the high end of the range, plaintiffs do not identify those exposures (including exposures to products of Trusts), resulting in higher defense costs and settlements.[420] The scenarios, from low to high, represent

[417] Tr. 2824:2-2827:15 (Bates).
[418] *Id.*
[419] Tr. 2831:8-2832:13 (Bates).
[420] Tr. 2824:2-2827:15 (Bates).

progressively less information that plaintiffs share about their alternative exposures. These different "information regimes" represented future scenarios for Garlock, and thus formed part of the pre-petition expenditure estimate range.[421]

Dr. Bates used the following graph to explain these conclusions:[422]



As a more general matter, Dr. Rabinovitz contended that Dr. Bates's methodology for determining expected judgments is untested and unaccepted.[423] This is false. Dr. Bates applied the scientific disciplines of economics and econometrics.[424] The fact that expected judgments are ordinarily not directly observed is not a valid criticism. A central concern of econometrics is estimating variables that are not directly observable, with Dr. Bates giving the examples of the impact of education on earnings and the impact of race on job opportunities.[425] Here, the variable estimated—expected outcomes—is one recognized by Law and Economics as a real and key

[421] Tr. 2824:2-2827:15, 2828:21-2829:16, 2830:2-2831:7 (Bates).
[422] Bates Demonstrative Slides at 78 (GST-8005).
[423] Tr. 4214:7-22 (Rabinovitz).
[424] Tr. 4804:8-9 (Bates).
[425] Tr. 2711:25-2712:9 (Bates); Tr. 4277:11-4278:5 (Heckman).

parameter in how the civil litigation system operates. It is also what the law calls upon this Court to estimate. *See, e.g., In re Dow Corning Corp.*, 211 B.R. at 566.

With respect to his calculations, Dr. Bates quantified the variance in his parameters, consistent with sound scientific practice as explained by Professor Heckman, using confidence intervals to bound uncertainty each step of the way.[426] Dr. Bates also used the standard Law and Economics model relating expected judgments, settlements, and litigation costs to confirm his estimate was reasonable and reliable.[427] Indeed, he was the only expert who reconciled Garlock's settlements and expected judgments against it.[428]

IV. A decision on the cost of resolving claims is premature, but in any event, should not exceed the $270 million proposed in Debtors' plan

A. The cost of settling current and future claims depends on how claims will be resolved, which has not been decided

The Committee and FCR urged the Court at trial to estimate what it would cost Debtors to resolve the mesothelioma claims that may be asserted against them—not the amount that claimants could expect to recover if their claims were allowed. For example, the experts for the Committee and FCR—Drs. Rabinovitz and Peterson—admitted that they projected only what Garlock would have paid to settle claims had it remained in the tort system and outside of bankruptcy.[429]

The Court should not accept the Committee and FCR's invitation to make findings regarding the cost of resolving claims. The Court in its Estimation Order made clear that claims

[426] Tr. 4804:3-7 (Bates).
[427] Tr. 4803:20-4804:2, 4804:10-4805:7 (Bates).
[428] Tr. 4804:24-4805:7 (Bates).
[429] Tr. 3979:16-3980:8 (Peterson); Tr. 4353:18-4354:2 (Rabinovitz). For this reason—and also because Garlock's settlements were not a measure of expected outcomes of litigation, *see* Part II, *supra*—the opinions of Drs. Rabinovitz and Peterson do not "fit" the matters at issue in this proceeding and are therefore inadmissible under Federal Rule of Evidence 702 and *Daubert*, as set forth in Debtors' Motion to Exclude or Strike Committee and FCR Estimation Expert Witness Opinions (Docket No. 2989). Debtors rely on this brief as further support for that motion, in lieu of filing what would be a duplicative reply to the responses filed by the Committee and FCR.

could ultimately be resolved through a variety of means—"through Garlock's Plan or that anticipated by the ACC and FCR . . . through litigation, settlement or a 524(g) Trust . . . [or through] some as yet unanticipated process." Estimation Order ¶ 10.

Each of these methods for resolving the claims would carry a different cost. A key conclusion of the Law and Economics model of litigation and settlement described in Part II, *supra*, is that settlements depend not only on liability but also on the costs of the system where litigation occurs. Thus, the system under which claims are resolved will have a significant effect on the costs of resolving the mesothelioma claims.

Litigation of all the claims, for example, would be costly, while a Trust would save considerable transaction costs. For example, Dr. Peterson has recognized in previous work that Trusts are able to resolve claims for billions of dollars less than the tort defendant could have in the tort system.[430] In one such case, the *W.R. Grace* case, the FCR agreed and 99.9% of asbestos claimants voted in favor of a plan that proposed to pay claimants 25% to 35% of Dr. Peterson's "tort system expenditures" forecast, while leaving Grace's shareholders with billions of dollars in equity.[431]

It is thus premature to make findings about the cost of resolving claims. The parties instead need findings about the expected allowed amount of the claims. With this number in hand, the parties can negotiate the means for allowing claims, hopefully in a way that saves transaction costs and avoids full-blown litigation of the claims. *See A.H. Robins Co.*, 788 F.2d at 1012 ("If the bankruptcy court could arrive at a fair estimation of the value of all the claims and

[430] 10/22/03 Tr. at 144-51, *In re Babcock & Wilcox* (Peterson) (GST-7324) (opining that "the liability under the trust distribution procedure is well under half of what the liability would have been if Babcock & Wilcox had continued in the tort system," saving over $6 billion); Mark A. Peterson, Preliminary Expert Report on W.R. Grace Trust (March 2009) at 1 (GST-6572) ("Using the TDP of the proposed reorganization plan, the Trust's liabilities were lower than its liability would be in tort litigation. The TDP could save up to $1 billion in liabilities compared to litigation.").

[431] Tr. 3092:18-3094:16 (Magee).

submit a fair plan of reorganization based on such estimation, with some mechanism for dispute resolution and acceptable to all interested parties, great benefit to all the claimants could be achieved and the excessive expense of innumerable trials, stretching over an interminable time, could be avoided.").

B. Projections of the cost of settling claims in the tort system are most unhelpful

The Committee and FCR not only improperly ask the Court to make findings about the cost of resolving mesothelioma claims would be: they ask the Court to make findings about what the cost would be *in the tort system*, as if Debtors had never filed for bankruptcy. Neither Dr. Rabinovitz nor Dr. Peterson measured, for example, the amount that a Trust would be expected to pay to resolve mesothelioma claims.[432] This, even though Dr. Peterson has admitted in previous work that Trusts are capable of resolving claims for billions of dollars less than the same defendants could resolve claims in the tort system.[433]

But the tort system appears to be the least likely means of resolving these claims. Dr. Peterson himself admitted that "outside of bankruptcy is a hypothetical question. You're talking about something that doesn't exist anymore. Trust is what's going to be paid in the future."[434] Nor did the Court in its Estimation Order contemplate that claims will be resolved in the tort system. *See* Estimation Order ¶ 10 (anticipating that claims could be resolved "through Garlock's Plan or that anticipated by the ACC and FCR," "through litigation, settlement or a 524(g) Trust," or through "some as yet unanticipated process," but not mentioning the tort system).

Dr. Peterson and Dr. Rabinovitz's projections of tort system expenditures are irrelevant to the Court for other, more troubling reasons: first, they ignore that most of Garlock's settlements

[432] Tr. 4117:24-4118:4 (Peterson); Tr. 4294:7-4297:6 (Rabinovitz).
[433] *See* 10/22/03 Tr. at 144-51, *In re Babcock & Wilcox* (Peterson) (GST-7324); Mark A. Peterson, Preliminary Expert Report on W.R. Grace Trust (March 2009) at 1 (GST-6572).
[434] Tr. 4112:22-25 (Peterson).

did not reflect its expected liability but its desire to avoid the relatively much higher costs of defending itself from liability, and second, their forecasts would perpetuate the effects of the non-disclosure of evidence that Debtors demonstrated occurred in the past and impacted their settlements. Drs. Rabinovitz and Peterson did not exclude settlements that were tainted by the latter practice from their projections. And these non-disclosures would not occur in any system under which claims are resolved in this Court.

Dr. Bates, for example, demonstrated that projected costs in the tort system would be substantially reduced if the effect of the practices Debtors identified were removed. Dr. Bates adjusted the settlement averages of law firms appearing on RFA Lists 1 and 1.A to equal the settlement averages of law firms that did not appear on those lists. That reduces projected settlements in the tort system to between $400 million and $500 million—less than half of Dr. Rabinovitz and Dr. Peterson's estimates.[435]

Faced with the Estimation Order, simple logic, and the law, the Committee and FCR support their invitation for the Court to make findings about the cost of resolving claims in the tort system with several cases from Delaware that are not binding precedent in this circuit.[436] As the Court recognized in the Estimation Order, this line of cases involved debtors who did not dispute their liability for asbestos claims, and thus presented an entirely different question from this case, where the *Dow Corning* and other cases cited by Debtors are the appropriate precedent.[437]

The other case repeatedly mentioned at trial by the Committee and FCR was the *Specialty Products* (Bondex) case. That case is currently being appealed, and is both factually and legally

[435] 4802:10-4803:5 (Bates) ; *see also* 4793:12-4794:25 (Bates)
[436] *See In re Armstrong World Indus., Inc.*, 348 B.R. 111 (D. Del. 2006); *Owens Corning v. Credit Suisse First Boston*, 322 B.R. 719 (D. Del. 2005); *In re Federal-Mogul Global, Inc.*, 330 B.R. 133 (D. Del. 2005).
[437] Estimation Order ¶ 15.

distinct from this case. It involves a different product (joint compound), and it is not clear that the debtor is disputing its liability. Nor did that debtor seek a bar date and allowance proceedings, unlike Debtors, and that debtor did not object to the use of settlements to estimate its liability. Also unlike Debtors, Bondex presented no evidence showing that plaintiffs had failed to disclose material exposure evidence during its pre-petition history. Finally, the decision is not binding on this Court.

For these reasons, the Court should disregard the evidence presented at trial regarding the cost of resolving claims in the tort system, and estimate the mesothelioma claims at $125 million pursuant to Debtors' unrebutted estimate.

C. If the Court chooses to project the cost of resolving the claims, it should estimate those costs at no more than $270 million—the cost of resolving mesothelioma claims under Debtors' plan

The only means currently proposed for resolving the mesothelioma claims is Debtors' plan of reorganization. Thus, if the Court chooses to project the cost of resolving claims, the only costs that would be relevant are those of Debtors' plan. Only Dr. Bates provided an estimate of costs to resolve claims under that plan, and that estimate was unrebutted at trial.

Mr. Magee explained that Debtors' plan will change the claims resolution environment for Garlock in two key ways.[438] First, it will permit Garlock to require greater transparency from claimants regarding their exposure pictures[439] and, second, it will decrease the cost of resolving claims. As described in Parts I and II *supra*, avoidance of costs was an important factor in

[438] Tr. 3056:6-16 (Magee).
[439] Tr. 3056:16-3057:8 (Magee).

Garlock's settlements.[440] Under a plan, claims will be resolved in a whole different environment with a different cost structure.[441]

Dr. Bates opined that the $270 million in funding provided in Debtors' plan would be sufficient to satisfy pending and future claims, while including a large contingency for unforeseen events.[442] As with any expenditure estimate, this estimate is higher than estimated final judgments, because Garlock would pay a premium over its liability in order to avoid defense costs associated with taking cases to final judgment.[443]

But expenditures under the plan would be lower than expenditures in the tort system because claimants would be required to disclose what they or their counsel know about their exposures, thus decreasing transaction costs and decreasing settlements.[444] For the 95% of cases with nil liability likelihood, Dr. Bates estimates that the plan reduces avoidable defense costs from $65,000 to about $20,000, reducing settlements from $37,000 to $12,000 (which is still significantly greater than settlements in the 1990s).[445]

Dr. Bates explained that settlements under the plan would give all claimants a significant premium over what they would receive if their claims were allowed.[446] The Plan has two settlement options, Expedited Review and Individual Review, with an option to litigate if neither option provides an acceptable settlement.

In Expedited Review, offers depend on claimant characteristics relevant to the strength of the claim, such as Henshaw contact group, age, life status, duration of exposure, spouse and

[440] *Id.*
[441] *Id.*
[442] Tr. 2705:16-22, 2833:14-25, 2837:8-25 (Bates).
[443] Tr. 2851:14-2852:4 (Bates).
[444] Tr. 2834:1-2835:20 (Bates).
[445] Tr. 2835:21-2837:7 (Bates).
[446] Tr. 2834:1-2835:20 (Bates).

dependents, and the state where the tort claim was filed.[447] For example, a 64-year old claimant who was a Navy pipefitter for fifteen years and filed his tort suit in Illinois would receive $94,000.[448] A typical claimant would receive somewhat less, as he would tend to be older and less likely to be in Henshaw Group 1—for example, a Group 2 claimant in California would receive $21,000.[449]

Individual Review, by contrast, is designed for special cases where the claimant alleges Garlock is the sole or only one of a few causes of his injury.[450] Individual Review therefore requires the claimant to provide information about alternative exposures and claims. For example, if a claimant contracted mesothelioma and showed that he was a gasket cutter who did not work around insulation, who is 64 and alive at the time of filing, with dependents, in Illinois, with only one other claim against the Manville Trust, he would receive over $1 million under Individual Review.[451] Typical claimants would receive less under Individual Review than under Expedited Review, and thus would opt for Expedited Review, saving transaction costs for all parties.[452]

Applying these criteria to pending and future claims, Dr. Bates determined that all claimants would receive more from settlement under Expedited Review or Individual Review than through opting to litigate, and thus would be expected to settle.[453] Henshaw Group 1 claimants would receive approximately $100 million in total (with an average settlement of

[447] Tr. 2838:24-2840:8 (Bates).
[448] Tr. 2840:21-2841:6 (Bates).
[449] Tr. 2841:7-19 (Bates).
[450] Tr. 2842:5-2844:9 (Bates).
[451] Tr. 2844:10-24 (Bates). Garlock does not believe any such claims exist. In decades of litigation, Garlock received a single claim in which the plaintiff alleged a similar work history and exposure profile, the *Phillips* case, which was filed in Texas. Subsequent to settling his case with Garlock, Mr. Phillips' lawyers filed over a dozen trust claims contradicting the exposure testimony he gave in the case against Garlock.
[452] Tr. 2844:25-2846:1 (Bates).
[453] Tr. 2846:2-2847:11 (Bates).

$49,000), while the average claimant would receive about $20,000.[454] This would leave approximately $56 million for unforeseen contingencies and Trust administration.[455]

V. Drs. Rabinovitz and Peterson failed to provide a reliable estimate of Garlock's hypothetical future costs of resolving claims in the tort system

Finally, Drs. Rabinovitz and Peterson failed to provide the Court with a reliable projection of what it would have cost Garlock to resolve pending and future mesothelioma claims in the tort system. Thus, they not only measured the wrong thing, but also did so unreliably. As set forth in Debtors' Motion to Exclude or Strike Committee and FCR Estimation Expert Witness Opinions (Docket No. 2989), their testimony is not admissible in federal court under the settled standards of *Daubert*. Moreover, even if the Court determined their testimony meets the standard for admissibility, the Court should not find it credible and should not rely on it to render an estimate in this case.

A. Drs. Rabinovitz and Peterson did not apply a reliable methodology to predict what Garlock would have paid to settle mesothelioma claims in the tort system

Drs. Rabinovitz and Peterson testified that they apply the same method for predicting what Garlock would have paid in the tort system to settle mesothelioma claims asserted against it.[456]

- First, they use an incidence model developed by others to generate estimates of the number of occupationally related mesothelioma deaths in the United States, in the past and in the future.
- Then, they select a "calibration period"—a period of years—from Garlock's past settlement history.

[454] Tr. 2848:24-2851:8 (Bates).
[455] *Id.*
[456] Tr. 4173:21-4198:13 (Rabinovitz); Tr. 3881:7-3884:1, 3889:14-3893:23 (Peterson).

- They derive from the calibration period the percentage of the incidence curve that sued Garlock (the "propensity to sue"), the percentage of those claimants whose claims Garlock settled (the "settlement rate"), and the average amount Garlock paid them (the "average settlement").
- To value pending claims, they count the number of open claims in the Garrison database, and multiply by the settlement rate and average settlement.
- To value future claims, they apply the propensity to sue, settlement rate, and average settlement from the calibration period to the number of future mesothelioma deaths predicted by the incidence curve.
- Finally, to generate a present value, they apply an inflation rate to the future claims and then discount to present value using a discount rate. They then add the present value of future claims to their projection for pending claims to yield their final projection.

1. Drs. Rabinovitz and Peterson performed no scientific or statistical test demonstrating that their "calibration periods" appropriately characterize what Garlock would have paid to settle future claims

Both Dr. Rabinovitz and Dr. Peterson regard the work they do as science.[457] Their work must therefore be judged according to the standards of science. As the Fourth Circuit has held, " 'Scientific' knowledge is generated through the scientific method—subjecting testable hypotheses to the crucible of experiment in an effort to disprove them. An opinion that defies testing, however defensible or deeply held, **is not scientific**." *Bynum*, 3 F.3d at 773 (emphasis added); *see also Daubert*, 509 U.S. at 593 ("Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified: indeed, this methodology is what distinguishes science from other fields of human inquiry."); *Buckman*, 893 F. Supp. at 554

[457] Tr. 4009:19-24 (Peterson); 4290:12-4291:4 (Rabinovitz).

("[A]n expert's evidence purporting to pertain to scientific knowledge must be founded in the scientific method (i.e., reviewing data, generating hypotheses, and testing them to see if they can be falsified."). A purportedly scientific opinion that has not been objectively tested is not admissible in federal court, much less probative at trial. *See Bynum*, 3 F.3d at 773.

The key expert judgment made by Dr. Rabinovitz and Dr. Peterson was their choice of calibration period, as Dr. Rabinovitz testified.[458] Once they chose their calibration periods, the figures that determine their forecast (propensity to sue, settlement rate, and average settlement) followed as a matter of simple arithmetic. *See* Tr. 3881:22-3882:1 (Peterson) ("It's just arithmetic. . . . And the calculations that I do are basically the same thing that Dr. Rabinovitz does."). Dr. Rabinovitz selected a calibration period of 2005-2010, while Dr. Peterson selected a period of 2006-2010.

Yet contrary to the dictates of *Bynum* and *Daubert*, neither Dr. Rabinovitz nor Dr. Peterson provided any scientific basis for choosing those calibration periods. At trial, neither testified to any statistical or other objective testing they performed to determine that the periods they selected are representative of the environment in which Garlock would have settled claims had it remained in the tort system. Rather, Drs. Rabinovitz and Peterson at best offered hypotheses—surmises about why one *might* believe that the calibration periods they chose are representative. Because they failed to take the next step and test those hypotheses, their methods are unreliable and unhelpful to the Court. *Bynum*, 3 F.3d at 773.[459]

[458] Tr. 4298:10-4299:11, 4300:5-13 (Rabinovitz).
[459] As noted above, Debtors rely on this brief in support of their *Daubert* motion and initial brief with respect to Drs. Rabinovitz and Peterson, in lieu of filing what would be a duplicative reply to the Committee and FCR's opposition to that motion.

a. Dr. Rabinovitz had no opinions regarding why Garlock's settlements varied over time, much less a statistical test demonstrating that Garlock's recent past is representative of the future

Dr. Rabinovitz at best provided the Court with a hypothesis: that Garlock's future is likely to resemble the recent past:

> Q. Okay. So the choice of the calibration period—I've been a little bit confused about the basis for that choice—it's supposed to provide a snapshot of a period during which Garlock's claims history or experience will look like—what you believe the future will look like?
> A. Yes.
> Q. So I thought I also heard you say you choose the calibration period closest to bankruptcy period because judges told you that's what you should choose.
> A. Yes, but you can see that there is a little bit of interpretation there when you look at the claim rates, next, were we choosing a higher claim rate with less data we could drive the claim rate up. So we're choosing not to take the three year, or the four year, which would be higher in the interests of maintaining more data in the five year.
> But yes, we believe that in the *Eagle-Picher* case the judge gave some helpful instructions about what he anticipated—anticipated estimators in his case, and future estimator should be required to do. And he emphasized the recency—I'm not even going to try the propinquity—I knew I shouldn't—the recency business as one of those criteria.
> Q. So you follow the general rule that the most recent history is the history you should use, and the judgment call as to how far to go prior to the bankruptcy case to pick the actual start date of your calibration period?
> A. Yes.[460]

But Dr. Rabinovitz then did nothing to test her hypothesis that the recent past is most representative of future settlements Garlock would have paid. She simply took her hypothesis and used it to calculate propensity to sue, settlement rate and average settlement, without testing it. In the words of one case, Dr. Rabinovitz "stopped halfway through the scientific method by only hypothesizing. The essence of the scientific method is *testing* a hypothesis, something [the expert] failed to do here." *Moore v. P&G-Clairol, Inc.*, 781 F. Supp. 2d 694, 704 (N.D. Ill. 2011) (emphasis in original). Dr. Rabinovitz's opinion therefore amounted to an *ipse dixit* ("because I said so") opinion that is not competent evidence in federal court. *See Gen. Elec. Co. v. Joiner*,

[460] Tr. 4300:14-4301:14 (Rabinovitz); *see also* Tr. 4184:7-4185:1, 4304:7-9 (Rabinovitz).

522 U.S. 136, 146 (1997) ("Trained experts commonly extrapolate from existing data. But nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert."); *Clark v. Takata Corp.*, 192 F.3d 750, 759 n.5 (7th Cir. 1999) ("A supremely qualified expert cannot waltz into the courtroom and render opinions unless those opinions are based upon some recognized scientific method and are reliable and relevant under the test set forth by the Supreme Court in *Daubert*.").

In fact, Dr. Rabinovitz did not even exercise independent expert judgment in generating her hypothesis. Instead, she drew her instruction from a Southern District of Ohio case from 1993, involving the friable asbestos products manufacturer Eagle Picher.[461] That case is legally and factually distinct from this case, as Eagle Picher made a dangerous product and there is no indication that the debtor disputed its liability. Indeed, the case counseled that debtors each made different products and thus must be evaluated differently according to their own circumstances. *See In re Eagle Picher Indus., Inc.*, 189 B.R. 681, 690 (Bankr. S.D. Ohio 1995) (instructing that "[t]he estimate should be primarily based upon the history of *this* company, particularly because there was no definitive showing of another or other company's production of a product line identical to that of debtors") (emphasis in original). There is no comparison between the friable products Eagle Picher manufactured (which forced it into bankruptcy long before the Bankruptcy Wave) and Garlock's gaskets and packing.

Moreover, by deferring to this long-ago case as grounds for her choice of calibration period, Dr. Rabinovitz in effect abdicated her expert function. She was instead nothing more than a conduit for simple math—the arithmetic of calculating a propensity to sue, settlement rate, and

[461] Tr. 4300:20-4301:9 (Rabinovitz) (citing the judge's statement in *Eagle Picher* case).

average settlement from the period she erroneously believed the *Eagle Picher* case mandated. This is a simple math exercise, not expert testimony that assists this Court.

Dr. Rabinovitz's failure to perform any analysis whatsoever is all the more egregious because there is no a priori reason why Garlock's recent settlements should be representative or characteristic of future settlements in the tort system. Garlock's settlement history has been extremely volatile, with the settlements during the few years before its petition were higher than almost any other period in its history. Garlock paid on average approximately $5,000 to settle a mesothelioma case in the 1990s—a figure many times less than the average settlement in Dr. Rabinovitz's calibration period.[462] Dr. Rabinovitz recognized that Garlock's settlements varied historically.[463]

Yet Dr. Rabinovitz did nothing to analyze why Garlock's settlements varied so much over time—an essential precondition to understanding whether the calibration period she selected is representative of conditions expected to exist in the future:

- Dr. Rabinovitz testified she has no theory about why Garlock's settlements increased from the 1990s to the 2000s, testifying that "I don't have a theory about why they increased. They—we simply looked at them [the settlements] and said, this is what it looks like, let's go forward."[464]
- In previous work, she recognized that the Bankruptcy Wave beginning in 2000 created enormous pressure on surviving companies.[465] In this case, however, she could not even state whether she holds that view today or whether it applies in Garlock's case.[466]

[462] Tr. 1389:18-1390:5 (Magee).
[463] Tr. 4301:15-4304:1 (Rabinovitz).
[464] Tr. 4301:15-4304:1 (Rabinovitz).
[465] Tr. 4305:8-4307:2 (Rabinovitz).
[466] Tr. 4305:8-4307:2 (Rabinovitz).

- Dr. Rabinovitz used 2005 as the start of her calibration period because she hypothesized that a "strategic change" of some kind occurred in that year. But she testified she did not investigate what that unspecified change may have been, much less have an expert opinion about it.[467]

Dr. Rabinovitz's failure to perform any analysis of the reasons why Garlock's settlements varied is most blatant in her approach to the impact of Trusts. Dr. Rabinovitz in previous work recognized that $30 billion in Trust funding should place "considerable downward pressure" on tort defendant indemnity values because setoffs for Trust payments are available under applicable law.[468] She now hypothesizes that this "downward pressure" did not in fact occur in Garlock's case, and would not happen in the future.[469]

But Dr. Rabinovitz did nothing to investigate why this pressure she previously predicted allegedly failed to materialize in Garlock's case. For example, she did not investigate the possibility that Trusts beginning operations in the late 2000s were paying a backlog of claims Garlock had already settled, such that any impact would not have been felt before the petition.[470] She recognized at trial that Trusts beginning operations in the late 2000s were paying a backlog, but did no analysis of the degree to which this was the case, or the overlap with Garlock's claims.[471] Most egregious, she did not study the DCPF data ordered in discovery by this Court that bears directly on this question.[472]

In fact, the only data upon which Dr. Rabinovitz relied for her opinion that Garlock would not see relief from Trusts was a document she obtained two weeks before her

[467] Tr. 4335:11-4336:7 (Rabinovitz).
[468] Tr. 4310:11-4311:10, 4312:17-4314:10 (Rabinovitz).
[469] Tr. 4323:11-17 (Rabinovitz).
[470] Tr. 4317:10-4318:21 (Rabinovitz).
[471] Tr. 4317:10-4318:23 (Rabinovitz).
[472] Tr. 4320:18-4323:3 (Rabinovitz).

deposition—long after her expert reports containing her estimates were served.[473] This PowerPoint presentation contained slides from an insurance conference stating that insurers had increased their reserves for asbestos claims recently.[474] This means Dr. Rabinovitz had no basis for discounting the impact of Trusts at the time she rendered her expert report as to this important issue.

Dr. Rabinovitz also acknowledged that a lack of Trust transparency could be a reason why defendants such as Garlock did not receive relief before Garlock's petition, but she did not analyze and does not know whether that was why Garlock failed to receive relief.[475] This, even though the PowerPoint presentation that she relied on recognized that Trust transparency is an important national issue.[476]

Simply put, Dr. Rabinovitz did not provide truly expert testimony in this case. She assumed that Garlock's recent past could predict its future settlements, and then performed a series of simple arithmetic steps to derive an estimate of Garlock's future settlements given that assumption. But she provided no statistical testing of the representativeness of Garlock's recent past, and did not even investigate why Garlock's settlements varied drastically over its recent history, much less present an objectively verifiable explanation. She did not apply a reliable scientific methodology and cannot be relied upon by the Court.

[473] Tr. 4326:9-10 (Rabinovitz) (playing video of Rabinovitz Dep. (June 21, 2013) at 152:12-154:18, 156:15-157:14, 161:25-162:10).
[474] Towers Watson, 2012 Casualty Loss Reserve Seminar, Concurrent Session LOB-1: Current Issues with Asbestos (Sept. 7, 2012) (GST-6595).
[475] Tr. 4328:3-10, 4329:3-7 (Rabinovitz).
[476] Tr. 4311:23-4312:16 (Rabinovitz).

b. Dr. Peterson did have opinions regarding why Garlock's settlements varied over time, but failed to provide any scientific test validating those opinions

Like Dr. Rabinovitz, Dr. Peterson assumed that "the future is going to be most like the recent past."[477] He thus selected Garlock's most recent settlement history for his calibration period (2005-2010).

In contrast to Dr. Rabinovitz, Dr. Peterson had numerous opinions regarding the history of asbestos litigation in general and why, in his view, Garlock's settlements varied over time and why his calibration period was the proper one to use. But just like Dr. Rabinovitz, he failed to provide any scientific or statistical test confirming his *ipse dixit* opinions, rendering them unhelpful (as well as inadmissible). *See, e.g.*, *Bynum*, 3 F.3d at 773; *Joiner*, 522 U.S. at 146.

Dr. Peterson admitted that the Bankruptcy Wave contributed to the increase in Garlock's settlements between the 1990s and 2000s, but attempted to minimize its importance by claiming it was only one of a "dozen" factors that contributed.[478] Yet he provided no quantification, data, or statistical testing of any of the alleged factors he named.[479] Instead, he testified that "[w]hen you've got dozens of events happening simultaneously, it's difficult to isolate the effect of any one and make a confident comment on it."[480] Nor did Dr. Peterson analyze whether any of the alleged dozen factors that allegedly increased Garlock's settlements in the past would remain the same or change in the future, admitting "that wasn't my goal."[481] He thus had no basis for his assumption that the future would resemble the past—he did not know how much each of his "dozen" factors contributed to Garlock's past settlements, and no basis for projecting how those factors would influence Garlock's settlements in the future.

[477] Tr. 4082:3-8 (Peterson).
[478] Tr. 3863:8-13, 3987:9-14, 4016:10-4017:5, 4047:20-4048:6, 4075:1-7 (Peterson).
[479] Tr. 4046:8-15 (Peterson).
[480] Tr. 4081:2-11 (Peterson).
[481] Tr. 4081:12-15 (Peterson).

Most notably, Dr. Peterson failed to analyze the effect that $30 billion in Trust funding would have on Garlock's future settlements. In previous cases, he claimed to be capable of measuring the impact of the Bankruptcy Wave on debtors' settlements, and he uniformly found that the bankruptcies would have dramatically increased those companies' settlements had they remained in the tort system.[482]

Now, by contrast, Dr. Peterson claims that the impact of the bankruptcies on Garlock cannot be measured "because it can't be isolated from the other contemporaneous events."[483] Dr. Peterson seems to have changed his opinion about the effect of the Bankruptcy Wave in order to avoid having to take into account the converse effect that $30 billion should have on Garlock's settlements.

Dr. Peterson similarly failed to analyze the impact of Trusts established by the same debtors whose liabilities he previously inflated due to the Bankruptcy Wave. He admitted that about $30 billion has been placed in Trusts to fund payments to claimants.[484] He hypothesized, however, that any effect of the Trusts on Garlock's settlements had already been incorporated into Garlock's pre-petition settlements.[485]

But Dr. Peterson did not analyze the most basic questions bearing on the plausibility of this hypothesis. For example, he did not analyze whether confidentiality and deferral provisions delayed the relief that Garlock would have otherwise received from Trusts.[486] Nor did he analyze the possibility that Trusts in the late 2000s were paying claims that Garlock had already settled (i.e., a backlog), such that one would not expect the impact to have occurred yet.[487] In prior

[482] Tr. 4017:6-4018:16, 4019:15-4020:2, 4031:5-15, 4032:5-4032:25 (Peterson).
[483] Tr. 4020:8-10 (Peterson).
[484] Tr. 4075:8-13 (Peterson).
[485] Tr. 4077:21-4078:1 (Peterson).
[486] Tr. 4078:25-4079:5 (Peterson).
[487] Tr. 4077:21-4078:1 (Peterson).

testimony in this Court, Dr. Peterson testified that because Trusts were paying a backlog of claims, any relief to Garlock would not have happened yet, making it important to analyze this question.[488] Yet he failed to do so before trial in this case—even though he still admits that some of the payments by Trusts did likely go to old claims Garlock had already settled.[489]

Most important, Dr. Peterson presented no statistical analysis showing that his calibration period is representative of what Garlock would have paid to settle claims in the absence of bankruptcy. It would not be possible for him to do so, as he disclaimed any ability to parse the causes of variation in Garlock's settlements in the past. *See People Who Care v. Rockford Bd. of Educ., Sch. Dist. No. 205*, 111 F.3d 528, 537-38 (7th Cir. 1997) (Posner, J.) ("[A] statistical study that fails to correct for salient explanatory variables, or even to make the most elementary comparisons, has no value as causal explanation and is therefore inadmissible in federal court.").

Thus, like Dr. Rabinovitz's projection, Dr. Peterson's projection was a mere arithmetical extrapolation not grounded in the scientific method.

2. Professor James Heckman confirmed that Drs. Rabinovitz and Peterson did not follow the scientific method

Debtors' parent, Coltec Industries Inc., presented testimony from Professor James Heckman, who teaches economics at the University of Chicago and was awarded the Nobel Prize in Economics for his work in econometrics.[490] The Court qualified Prof. Heckman as an expert in economics, econometrics, economic forecasting, and forecasting based on future behaviors and changing incentives.[491] Prof. Heckman testified about the reliability of Drs. Rabinovitz and Peterson's forecasts, and their compliance with the scientific method.[492]

[488] 10/15/10 Hearing at 415:7-419:7 (Peterson).
[489] Tr. 4076:19-4077:8 (Peterson).
[490] Tr. 4225:9-14, 4228:24-4229:8, 4230:3-4231:10 (Heckman).
[491] Tr. 4233:16-22 (Heckman).
[492] Tr. 4225:15-4226:2 (Heckman).

Prof. Heckman, after studying the work of Drs. Rabinovitz and Peterson, concluded that they did not use generally established econometric or statistical techniques, or follow the scientific method.[493] Their opinions were based on their "private knowledge," without reporting on "sensitivity, on variability, and reliability of their estimates."[494]

Prof. Heckman testified that Drs. Rabinovitz and Peterson had no scientific basis for selecting their calibration periods.[495] They simply selected the most recent period and extrapolated. Prof. Heckman testified, "I heard to my surprise that there's somehow a princip[le] established that you use the most recent period to establish what should be happening in the rest of the next ten, 20, 30 years. That simply isn't true. We've seen the failure of that in evaluating stock prices" as well as home prices.[496] Given the level of change in asbestos litigation over time, a simple extrapolation of this nature cannot be trusted without objective verification, which Drs. Rabinovitz and Peterson did not provide.[497] Nor it is appropriate for an expert to justify their method by reference to a judicial opinion, as Dr. Rabinovitz did with the *Eagle Picher* case (which does not even support the point she cited it for): "This is a key part of the scientific method. You don't just say I picked up some method because some judge told me somewhere that this is what you're supposed to do."[498] *See also* Tr. 4254:19-4255:4 (Heckman) (in competent statistical assessment, "You don't just report a number and say I've been doing this or somebody told me to do it.").

In addition, Drs. Rabinovitz and Peterson did not perform basic tests of the statistical variability of their forecasts that are an essential part of the scientific method (and which, as

[493] Tr. 4233:24-4235:1 (Heckman).
[494] Tr. 4235:2-20 (Heckman).
[495] Tr. 4236:14-4238:10, 4241:22-4242:19 (Heckman).
[496] *Id.*
[497] Tr. 4238:11-4239:9, 4240:10-4241:18, 4243:14-4245:3 (Heckman).
[498] Tr. 4276:17-20 (Heckman).

described above, Dr. Bates did perform). They did not provide confidence intervals for the parameters they estimated (such as propensity to sue and settlement rate), which is "a standard rule."[499] This by itself renders their projections unreliable.[500] Prof. Heckman measured the variability of some of Dr. Peterson's parameters, finding for example that his propensity to sue exhibits forty percent variability (twenty percent up and twenty percent down).[501]

For all these reasons, Prof. Heckman testified that if Dr. Rabinovitz and Peterson's work were submitted to a journal where he was the editor (such as the Journal of Political Economy), it "would be what the journal would call a desk reject. They'd return it back to the author and say we're not going to waste your time on processing it if it doesn't meet the beginning . . . . So you wouldn't waste his time, the author's time, and you wouldn't waste the referee's time because you could see that it was just not good."[502] Prof. Heckman thus confirmed that the projections of Drs. Rabinovitz and Peterson are neither competent nor credible. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999) (purpose of *Daubert* is "to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field").

3. Expert opinions not grounded in the scientific method are neither helpful nor admissible

The case of *In re Aluminum Phosphide Antitrust Litig.*, 893 F. Supp. 1497 (D. Kan. 1995) also demonstrates why both Dr. Rabinovitz and Dr. Peterson's opinions are neither admissible nor credible. The case involved expert testimony purporting to estimate the price of a product in the absence of an antitrust conspiracy—a "but for" estimate just like Drs. Rabinovitz and Peterson's estimates of Garlock's expenditures "but for" its bankruptcy petition.

[499] Tr. 4245:23-4246:19, 4246:20-4249:1 (Heckman).
[500] Tr. 4249:2-4249:10 (Heckman).
[501] Tr. 4249:11-4253:1 (Heckman).
[502] Tr. 4259:24-4260:13 (Heckman).

To characterize this price level, the expert (a trained economist) picked a period fifteen months after the conspiracy was discovered (the first ten months of 1993). *Id.* at 1501-2. The expert claimed that his period was "representative" of prices absent the conspiracy. *Id.* He also claimed that it was necessary to look fifteen months after the conspiracy was discovered because of a "lag time" for prices to readjust. *Id.*

The court held that this opinion was not admissible in federal court because the expert did not provide objective, scientific validation for his choice of a period—only his say-so. *Id.* at 1502-3. The economist did not, for example, examine the pre-conspiracy period when prices were higher, much less use regression analysis to "identify the reasons for the disparate price levels," "a statistical methodology for making this determination on a scientific basis." *Id.* at 1503. The court concluded by finding that "[o]ne does not need an expert economist to do what Dr. Hoyt proposes to do. A non-expert, using Dr. Hoyt's criteria, could pick as an equally valid normative period any arbitrary time period, of any length, occurring at any time after the date of the admitted conspiracy. Dr. Hoyt's analysis is driven by a desire to enhance the measure of plaintiffs' damages, even at the expense of well-accepted scientific principles and methodology." *Id.* at 1506-7.

Drs. Rabinovitz and Peterson's forecasts are no more reliable. They picked their all-important "calibration periods" based on mere hypotheses that the future would resemble the immediate past. Their forecasts then play out the consequences of their assumption. But they provided no scientific basis for believing that those periods are representative—no basis at all other than their *ipse dixit*—rendering their estimates unreliable and unhelpful to the Court. *See also Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic*, 152 F.3d 588, 593 (7th Cir. 1999) (Posner, J.) (holding in context of antitrust case, "[a]ny nonconspiratorial factors

likely to have made the prices charged by the Marshfield Clinic higher than the prices charged by other health care providers had to be taken into account in order to make a responsible estimate of the prices that Blue Cross would have paid had it not been for the conspiracy," and excluding expert testimony that failed to do so).

4. Dr. Bates rigorously explained why Garlock's settlements increased and why they would not have remained at that level going forward

In contrast to Dr. Rabinovitz and Dr. Peterson, Dr. Bates did scientifically analyze Garlock's past settlements and how those settlements would have varied in the future if Garlock had remained in the tort system.

First, unlike Drs. Rabinovitz and Peterson, Dr. Bates did study, in an objective way, why Garlock's settlements varied in the past, and tested his explanation using valid statistical techniques. He proved, using the standard Law and Economics model and his statistical age decrease test, that Garlock's settlements increased from the 1990s to the 2000s because of a massive increase in defense costs and a small increase in trial risk.[503]

Dr. Bates hypothesized that those things both happened as a result of the bankruptcies of Garlock's major co-defendants beginning in 2000. With those companies in bankruptcy, plaintiffs frequently did not identify their exposures to those companies' products, requiring Garlock to spend money to develop that evidence that was vital to its defense.[504] This increased Garlock's defense costs and thus, under the Law and Economics model, increased the settlements that plaintiffs were able to demand. This has been Dr. Bates's hypothesis since Dr.

[503] Tr. 2756:19-2763:7, 2763:23-2770:10 (Bates).
[504] Tr. 4789:11-4790:10 (Bates).

Bates was generating expenditure estimates for EnPro financial reporting, long before this case.[505]

Discovery obtained in this case allowed Dr. Bates to test his hypothesis. Debtors obtained data about claims filed with ten Trusts by the approximately 11,000 mesothelioma claimants who settled with Garlock between 1999 and 2010, including data about the timing of those claims.[506] These data showed that where plaintiffs filed a Trust claim before settling with Garlock, their settlements were lower on average than settlements obtained by plaintiffs who did not file a Trust claim before settling with Garlock.[507] This was consistent with Garlock's success in cases where it obtained Trust claims (such as the *Dougherty*, *Messinger*, and *Davis* cases described above), and corroborated Dr. Bates's hypothesis that Garlock's settlements increased because of the costs of obtaining evidence that plaintiffs temporarily did not provide after the Bankruptcy Wave.

The DCPF data also showed that the conditions that caused Garlock's settlements to increase will not persist in the future. An increasing number of plaintiffs before the petition were filing Trust claims before settling with Garlock, as Trusts that had worked through their backlog of pending claims began to pay new claims on a contemporaneous basis.[508] Dr. Bates testified that there is every reason to expect more and more claimants to file their Trust claims before settling with tort defendants. Plaintiffs need money for expenses and Trusts pay significant amounts that are increasing as more Trusts are established.[509] For example, 95 percent of PIQ

[505] Tr. 4790:11-22 (Bates).
[506] Tr. 2651:12-2652:9 (Gallardo-Garcia).
[507] Tr. 4795:11-4796:22 (Bates).
[508] Tr. 4799:13-4800:3 (Bates).
[509] Tr. 4800:4-15 (Bates).

claimants with pending claims have already filed a significant number of Trust claims (the median is 18 Trust claims, with 8 claims paid).[510]

Dr. Bates thus explained, using valid scientific and statistical methods, why Garlock's settlements increased from the 1990s to the 2000s, and why those conditions would not have persisted had it remained in the tort system.

5. Drs. Rabinovitz and Peterson's failure to use scientific methods has resulted in grievous errors in past work

Time has demonstrated that Drs. Rabinovitz and Peterson's methods are not predictive and therefore not scientific. Dr. Rabinovitz highlighted at trial her work in the *Owens Corning* case.[511] But subsequent events have proven that she made massive errors in that estimate. There, as here, she used the most recent period in Owens Corning's history to predict, among other things, the future number of non-malignant claims had it remained in the tort system. On that basis, she predicted hundreds of thousands of non-malignant claims that would cost billions of dollars. In fact, non-malignant claims declined precipitously after 2004—Dr. Rabinovitz's simple extrapolation had no predictive power whatsoever.[512]

Similarly, Dr. Peterson's extrapolation methods are so unreliable, he forecast large numbers of future non-malignant claims as late as 2009—years after these claims had collapsed. For example, in 2004 in the *Federal-Mogul* case, while Dr. Bates predicted future non-malignant claims would be immaterial going forward, Dr. Peterson testified that Federal-Mogul would receive one million more claims.[513] Dr. Peterson admitted Dr. Bates "did a good job then."[514] In

[510] Tr. 4800:17-4801:6 (Bates).
[511] Tr. 4161:1-4162:3 (Rabinovitz).
[512] Tr. 4337:25-4340:20 (Rabinovitz).
[513] Tr. 4107:21-24 (Peterson).
[514] *Id.*

2009, Dr. Peterson predicted $2 billion of non-malignant claims for W.R. Grace.[515] These claims did not and will not exist.

In contrast to Drs. Rabinovitz and Peterson, Dr. Bates is a trained economist and econometrician who used scientific methods in previous cases and this case. He has repeatedly demonstrated the predictive value of his models. As discussed above, Dr. Bates developed the incidence model upon which Dr. Rabinovitz relies and upon which Dr. Peterson has relied in the past, and he has continued to improve the model as new data becomes available.

In addition, whereas Dr. Rabinovitz and Dr. Peterson failed to predict the collapse of non-malignant claims, Dr. Bates predicted this change in the early 2000s.[516] In his research, he discovered that those claims depended mostly on mass recruitment at a limited number of industrial sites rather than on a biological process, meaning the claims were more like a gold rush than a sustainable phenomenon.[517] He verified this hypothesis through statistical testing.[518] He thus correctly predicted that past claiming trends could not be extrapolated into the future, and correctly predicted the rapid collapse that in fact occurred in the mid-2000s.[519] That demonstrated the power of true economic analysis.

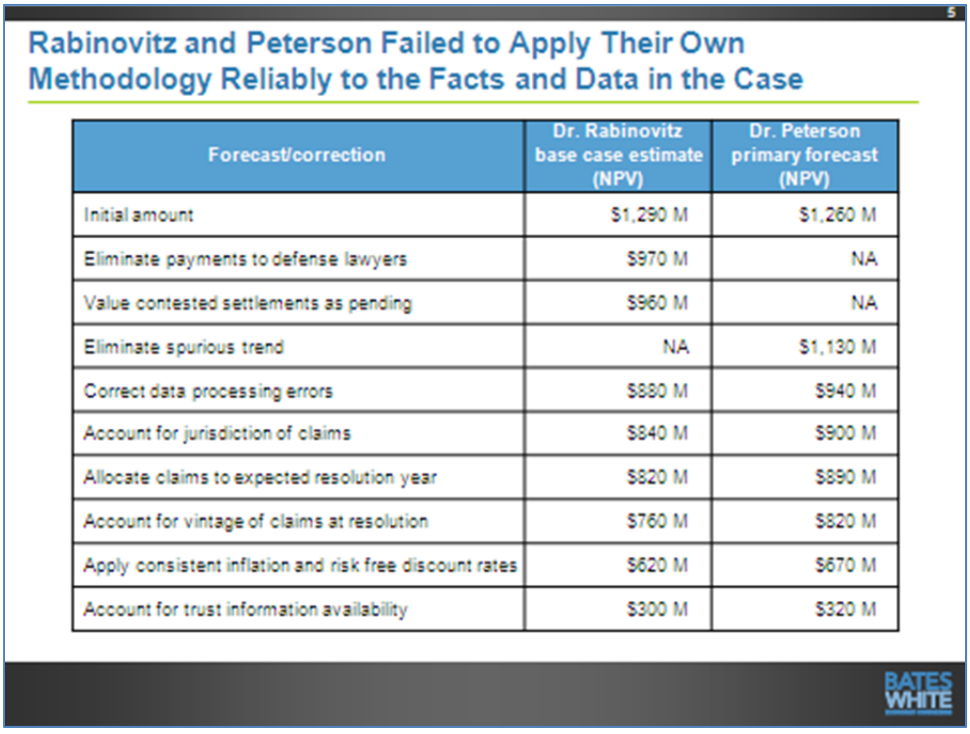
This case is about mesothelioma claims, not non-malignant claims. But the three experts' use of the same methods they used here in analyzing non-malignant claims shows the utility of their methods. Dr. Bates's scientific methods are reliable, while Drs. Rabinovitz and Peterson's methods are unscientific and lack any explanatory power.

[515] Tr. 4107:25-4108:5 (Peterson).
[516] Tr. 2724:15-2725:17 (Bates).
[517] Tr. 2720:10-2724:1 (Bates).
[518] *Id.*
[519] Tr. 2724:2-2725:17 (Bates).

B. Drs. Rabinovitz and Peterson made basic errors in calculating the hypothetical future costs of resolving claims in the tort system

The Court cannot rely on Dr. Rabinovitz and Dr. Peterson because they selected their calibration periods unscientifically, rendering their estimates unreliable and ultimately useless.

But even taking their calibration periods as a given, Drs. Rabinovitz and Peterson failed to apply their methodology reliably to the facts and data in this case. Dr. Bates used the following chart to summarize the basic errors Drs. Rabinovitz and Peterson committed in applying their methods, and the effect on their forecasts:[520]



Forecast/correction	Dr. Rabinovitz base case estimate (NPV)	Dr. Peterson primary forecast (NPV)
Initial amount	$1,290 M	$1,260 M
Eliminate payments to defense lawyers	$970 M	NA
Value contested settlements as pending	$960 M	NA
Eliminate spurious trend	NA	$1,130 M
Correct data processing errors	$880 M	$940 M
Account for jurisdiction of claims	$840 M	$900 M
Allocate claims to expected resolution year	$820 M	$890 M
Account for vintage of claims at resolution	$760 M	$820 M
Apply consistent inflation and risk free discount rates	$620 M	$670 M
Account for trust information availability	$300 M	$320 M

Once these errors are corrected, Drs. Rabinovitz and Peterson's estimates can be reconciled with the pre-petition financial reporting ranges and Dr. Bates's estimate of expected judgments.[521]

1. Dr. Rabinovitz erroneously included future tort system defense costs in her estimate

[520] Bates Rebuttal Demonstrative Slides at 5 (GST-8026).
[521] Tr. 4758:6-23 (Bates).

In the first place, approximately $320 million of Dr. Rabinovitz's estimate consists of payments she estimates Garlock would have made to defense lawyers to defend claims in the tort system.[522] Her estimate ranges from $893 million to $949 million when these expenditures are deducted.[523] Dr. Rabinovitz offered three justifications for including defense costs in her estimate: (1) because Dr. Bates made the argument that costs of defense were an important driver of Garlock's settlements, (2) because Garlock is not "visibly insolvent," and (3) because a Trust will have administrative costs.[524]

These expenditures are not, however, properly included in an estimate, even under the legal theories espoused by the Committee and FCR. Dr. Rabinovitz admitted that Garlock's lawyers and experts do not have claims for fees they would have earned if Garlock had not filed for bankruptcy, nor do claimants have claims for such fees.[525] She also recognized that the hard defense costs she added to her estimate are different from the avoidable defense costs Dr. Bates testified drove Garlock's settlement decisions.[526] Dr. Rabinovitz also acknowledged that she has never added in estimated defense expenditures in previous bankruptcy estimation opinions,[527] apparently doing so here only for the purpose of increasing the nominal value of her estimate to support an assertion by the FCR that Garlock is insolvent.

Finally, Dr. Rabinovitz admitted that projected defense costs in the tort system are not an accurate proxy for Trust expenses of administration. She has not estimated administrative costs of a Trust and has expressed no opinion about what those would be, but recognizes that those

[522] Tr. 4761:6-12 (Bates).
[523] Tr. 4293:7-4293:15 (Rabinovitz).
[524] Tr. 4194:15-4195:24 (Rabinovitz).
[525] Tr. 4293:20-4294:6 (Rabinovitz).
[526] Tr. 4297:14-19 (Rabinovitz). Moreover, when she rendered her report, which included this estimate of defense costs, she had not yet seen Dr. Bates's report and thus did not yet know what "argument" he was going to make.
[527] Tr. 4291:25-4292:22 (Rabinovitz).

costs ordinarily are nowhere near the costs of defense in the tort system.[528] Thus, she admitted the proper time for assessing those costs is after Trust distribution procedures have been proposed.[529]

Dr. Bates testified that payments for costs of Trust administration run about six or seven percent of total expenditures, not 35 percent, as Dr. Rabinovitz's defense cost estimate would imply, reinforcing that these defense expenditure estimates are not properly included in any estimate before this Court.[530]

2. Dr. Rabinovitz erroneously valued contested settlements

Dr. Rabinovitz incorrectly treated settlements that are contested by Debtors, as summarized in an interrogatory response from Debtors, as settled cases rather than pending cases.[531] In addition, when she extracted the contested settlements from the pending claim pool, she failed to properly correct the average value of the remaining claims.[532] She also made errors in the computer code she used to account for contested settlements, which resulted in double counting them.[533] Altogether, this amounted to a $10 million error.[534]

Dr. Rabinovitz had no response to this criticism, and admitted it may be correct.[535] Still, she was unwilling to correct her forecast because "on behalf of the futures representative, we want to draw attention to this group and hope that it can be not estimated but valued in a way that will provide special funds for them right away and not be removed . . . ."[536] In this and other testimony, Dr. Rabinovitz assumed the role of an advocate for Mr. Grier and his constituency—

[528] Tr. 4294:7-4296:10 (Rabinovitz).
[529] Tr. 4297:3-6 (Rabinovitz).
[530] Tr. 4759:18-4761:4 (Bates).
[531] Tr. 4761:13-4763:2 (Bates).
[532] *Id.*
[533] Tr. 4688:1-4690:8 (Gallardo-Garcia).
[534] Tr. 4761:13-4763:2 (Bates).
[535] Tr. 4188:23-4190:22, 4200:16-4201:2 (Rabinovitz).
[536] Tr. 4190:15-19 (Rabinovitz).

not a scientist whom the Court can trust to have rendered a reliable estimate. *See also* Tr. 4195:12-24 (Rabinovitz) (testifying with respect to her inclusion of tort system defense costs, "[T]hey are a reminder to us, **us being Mr. Grier and me and the lawyers**, that the trusts are going to have administrative costs. And again, because **we're** very penurious, not to say cheap, we want to never forget that **we** need to put aside funds for administration . . .") (emphasis added); Tr. 4295:12-25 (Rabinovitz) ("[I]t is necessary to provide an estimate of those fees, particularly as the expert for the future's representative, because **we** want those set aside in a fund for administration . . .") (emphasis added).

3. Dr. Peterson applied an arbitrary increase in future propensity to sue Garlock

Dr. Peterson increased claimants' propensity to sue Garlock for 4.5 years after his calibration period, increasing his forecast by $130 million.[537] His sole reason for applying this increase was (as he stated in his report) that he found the ultimate estimate he obtained by his own methodology without the trend to be "implausibly low."[538]

Dr. Peterson failed to recognize that no five-year period from the past decade displays the same trend.[539] Nor did Dr. Peterson recognize that in Garlock's history, there is a clear inverse relationship between propensity to sue and the payment rate: even when more plaintiffs sued, no greater number of plaintiffs was paid.[540] Dr. Peterson did not adjust his payment rate down when he adjusted propensity to sue upward.

Ultimately, as Dr. Bates testified, Dr. Peterson's $130 million propensity to sue trend demonstrates the results-oriented nature of Dr. Peterson's estimate, as it is based on no coherent mathematical model and is not supported by a hypothesis about why even more claimants would

[537] Tr. 4763:24-4764:8, 4770:22-25 (Bates); Tr. 3898:5-3899:23 (Peterson).
[538] Tr. 4763:24-4764:8 (Bates).
[539] Tr. 4764:9-4766:3 (Bates).
[540] Tr. 4767:10-4768:15 (Bates).

sue Garlock in the future.[541] Dr. Peterson admitted that he looked at no data to determine whether there was a basis for concluding that propensity to sue Garlock would increase in future years.[542]

Dr. Peterson's sole defense of his trend was to argue that he could have found and used propensity to sue trends that were even higher than the one he used.[543] These trends were just as arbitrary as the trend Dr. Peterson used.[544]

4. Drs. Peterson and Rabinovitz made basic data processing errors

Drs. Peterson and Rabinovitz also made basic data errors that resulted in overestimates of $80 million in the case of Dr. Rabinovitz and $190 million in the case of Dr. Peterson.[545]

a. Errors that affected number of pending claims/dismissals

Dr. Gallardo-Garcia testified that approximately 2,000 claimants responded to the PIQ by stating that they did not have pending mesothelioma claims because their claims had already been dismissed against Garlock, their claims were withdrawn, or they did not have mesothelioma.[546] But Dr. Rabinovitz and Dr. Peterson both admitted they did not use PIQ responses in their estimation work.[547] As a result of this and other failures to consider information available in the case, each of them overestimated the number of pending mesothelioma claims by approximately 750.[548]

This inflated Dr. Rabinovitz and Dr. Peterson's pending claim estimates because they valued too many pending claims.[549] In addition, because they failed to account for some dismissals, their dismissal rates in their calibration periods were too low and their settlement

[541] *Id.*; Tr. 4770:12-21 (Bates).
[542] Tr. 4093:4-13 (Peterson).
[543] Tr. 3961:4-3962:24 (Peterson).
[544] Tr. 4768:16-4769:16 (Bates).
[545] Tr. 4779:4-8 (Bates); Bates Rebuttal Demonstrative Slides at 5 (GST-8026).
[546] Tr. 2632:23-2634:4 (Gallardo-Garcia).
[547] Tr. 4118:7-4119:2 (Peterson); Tr. 4202:20-4203:14 (Rabinovitz).
[548] Tr. 4681:2-4683:6, 4688:1-4690:13 (Gallardo-Garcia).
[549] Tr. 4771:1-14 (Bates); Tr. 4690:14-25 (Gallardo-Garcia).

rates were too high.[550] Dr. Rabinovitz overestimated the settlement rate in her calibration period by 1.4 percentage points, and Dr. Peterson overestimated his settlement rate by 4.2 percentage points.[551]

Dr. Rabinovitz responded to these criticisms by asserting that the PIQs were ambiguous and therefore unhelpful.[552] But as Dr. Gallardo-Garcia testified, responses stating that the claimant did not have a pending mesothelioma claim were not ambiguous.[553] Claimants reported, for example, that "[a]ll defendants were dismissed on 7/24/2009"; "case was dismissed without prejudice by order filed on August 18, 2009"; and claimants were "not diagnosed with [m]esothelioma."[554] Dr. Rabinovitz could not recall even looking at this correspondence from lawyers submitted in connection with the PIQ process and made available to all experts.[555]

Dr. Peterson's "mos t important" response to these criticisms was to claim it was inappropriate to take account of PIQ claimants who said they did not have mesothelioma, because there may have been mesothelioma claimants listed in the database with "unknown" disease (or an erroneous other disease) who therefore did not receive a PIQ but who do have mesothelioma.[556] In other words, Dr. Peterson admitted that errors existed in his database overstating pending mesothelioma claims by approximately 750, but opined that it was improper to correct that error because it could be offset by other errors understating the number of pending mesothelioma claims. In support of this point, Dr. Peterson presented what he termed a

[550] *Id.*
[551] Gallardo-Garcia Rebuttal Demonstrative Slides at 14 (GST-8025).
[552] Tr. 4168:23-4169:11 ("An individual might say that he had been exposed at a particular site but then, when you look further, that site was not listed on his later responses."), 4202:20-4203:14 (Rabinovitz).
[553] Tr. 4683:7-4685:19 (Gallardo-Garcia).
[554] Gallardo-Garcia Rebuttal Demonstrative Slides at 5, 6, 8 (GST-8025).
[555] Tr. 4351:19-24 (Rabinovitz).
[556] Tr. 3957:2-3960:15 (Peterson).

"transition analysis" supposedly showing the number of unknown disease claims that one should expect to turn into mesothelioma claims.[557]

In the first place, Dr. Peterson is wrong that this is the "most important" issue with respect to the database errors. As Dr. Gallardo-Garcia explained, the misclassified claims were mostly resolved claims (principally dismissed claims), not claims where claimants said they did not have mesothelioma.[558] Taking the resolved claims into account does not threaten any potential bias.[559]

In addition, Dr. Bates explained that Dr. Peterson's transition analysis is faulty because he uses a period when Garrison at Bates White's direction was cleaning up its database. This results in higher transition rates than would be observed in the current database used by Dr. Peterson (and Dr. Rabinovitz).[560]

In any event, Dr. Bates showed that Dr. Peterson's "transition" point is an illusory one. There are only 1,334 unknown disease claims since 2005 (the claims that one would expect to be candidates for transition), and using the transition rates that Dr. Peterson used, a very small number of those (85) would become mesothelioma claims, 58 of which *already* emerged in the PIQ process and were taken into account by Dr. Gallardo-Garcia.[561] Dr. Peterson generated a high number of transitioning claims only by applying transition rates to much older claims (likely non-malignant) that are very unlikely to transition into valuable mesothelioma claims.[562]

[557] *Id.*
[558] Tr. 4685:20-4686:16 (Gallardo-Garcia).
[559] Tr. 4686:17-24 (Gallardo-Garcia).
[560] Tr. 4775:21-4777:22 (Bates).
[561] Tr. 4778:9-4779:3 (Bates).
[562] *Id.*

Dr. Peterson also alleged that some of the changes in claim status as a result of the PIQ occurred because of settlements reached after the bankruptcy, which are not relevant to his work because they are based on "what's going to be the allowance in the bankruptcy case."[563]

But Dr. Peterson is simply wrong about the facts. The resolutions he failed to recognize generally were not settlements, but dismissals.[564] Thus, Dr. Peterson's attempts to justify not taking into account PIQ data that bore directly on his forecast were not credible.

b. Errors that affected average settlement amount

Drs. Peterson and Rabinovitz also had database errors that impacted their average settlement amounts. Most glaring, both Dr. Rabinovitz and Dr. Peterson placed three verdicts that were rendered in 2002, 2004, and early 2005 (outside their calibration periods) in 2010. They placed these verdicts in 2010 because Garlock received contribution payments from Trusts relating to each of these verdicts in that year.[565] As a result, Dr. Rabinovitz and Dr. Peterson's average settlement amounts were too high—by nine percent in the case of Dr. Peterson and seven percent in the case of Dr. Rabinovitz.[566] Indeed, it resulted in Dr. Peterson erroneously representing to this Court that Garlock's settlement values increased in the year before the bankruptcy petition.[567] In fact, they decreased.[568]

Neither Dr. Rabinovitz nor Dr. Peterson defended their placement of those verdicts in 2010. Instead, when confronted with this error, they argued that the error was immaterial because the verdicts should be placed in the year they were paid, not the year they were rendered, such

[563] Tr. 3955:22-3957:2 (Peterson).
[564] Tr. 4686:12-16, 4690:14-25 (Gallardo-Garcia).
[565] Tr. 4691:23-4693:11 (Gallardo-Garcia); *see also* Tr. 4332:10-14 (Rabinovitz) (admitting that 2010 payments on three verdicts were payments to Garlock for contribution from Trusts).
[566] Tr. 4691:23-4693:1, 4693:12-20 (Gallardo-Garcia); Gallardo-Garcia Rebuttal Demonstrative Slides at 15 (GST-8025); Tr. 4774:14-4775:20 (Bates).
[567] Tr. 3886:25-3887:23 (Peterson).
[568] Tr. 4691:23-4693:11 (Gallardo-Garcia).

that they would remain in their calibration periods and sustain their average settlement amounts.[569]

Dr. Bates explained why placing verdicts in payment year is also erroneous. Adverse verdicts tend to increase settlement payments in subsequent years, leading to a higher average settlement amount.[570] Thus, putting the verdicts also in those later years (if the verdict is paid then) double counts the effect of the verdict and thus inappropriately characterizes the average settlement amount going forward.[571] The Court should reject Drs. Rabinovitz and Peterson's ad hoc justification of their erroneous accounting for these verdicts.

5. Drs. Rabinovitz and Peterson applied inflated average settlement amounts to pending claims

Drs. Rabinovitz and Peterson applied incorrect average resolution amounts to pending claims because they failed to recognize that pending claims differ from resolved claims (from which they derived their resolution amounts) in several respects. Pending claims are a group of claims remaining after Garlock has settled and paid many of the most valuable claims.

In the first place, pending claims on average come from lower-settlement jurisdictions than the jurisdictions of the settled claims in their calibration periods.[572] To take an example, 22 percent of settled cases come from the high-settlement jurisdictions of California and New York, whereas only 15 percent of the pending claims come from those states.[573] By applying average settlement amounts derived from their calibration periods, Drs. Rabinovitz and Peterson applied inappropriately high average settlement amounts to the pending claims.[574]

[569] Tr. 4201:12-4202:16 (Rabinovitz).
[570] Tr. 4771:15-4774:13 (Bates).
[571] *Id.*; Tr. 4774:14-4775:20 (Bates).
[572] Tr. 4779:9-4781:6 (Bates).
[573] *Id.*
[574] *Id.*

Dr. Rabinovitz had no direct response to this criticism, but only testified in passing that she did not take the jurisdictional issue into account because where claims are filed can change as venue rules and other tort system factors change.[575] But she failed to understand that her point does not apply to pending claims—the subject of Dr. Bates's criticism in this regard—which have already been filed, have been pending in the same jurisdictions for years, and will not change venue.

Dr. Peterson answered this criticism by maintaining that when the analysis is performed with all fifty states, it yields a higher average settlement amount for pending claims than for settled claims.[576] But Dr. Bates explained that Dr. Peterson obtained this result by ignoring dismissals—because the jurisdictions where pending claims tend to be found had more dismissals than jurisdictions where resolved claims arose, the resolution average (i.e. the product of average settlement amount and settlement rate, the key parameter in Dr. Peterson and Dr. Rabinovitz's forecasts) *is* lower when all fifty states are considered.[577]

Drs. Rabinovitz and Peterson also failed to account for the vintage of pending claims, i.e. the fact that pending claims at the petition date had been pending for longer (on average) than settled claims were when they were settled (on average).[578] Because claims settle for less the longer they have been pending, this resulted in Drs. Rabinovitz and Peterson applying a settlement average to pending claims that was too high.[579]

Dr. Peterson responded with a non sequitur. He stated (correctly) that older claims often still settle.[580] But he failed to address Dr. Bates's actual point, which is that, when they do settle,

[575] Tr. 4208:9-4209:15 (Rabinovitz).
[576] Tr. 3963:2-3964:12 (Peterson).
[577] Tr. 4781:7-4782:8 (Bates).
[578] Tr. 4782:9-4783:16, 4784:20-4786:9 (Bates).
[579] *Id.*
[580] Tr. 3953:11-3954:9 (Peterson).

they settle for less, on average, than the settlement average Dr. Peterson (and Dr. Rabinovitz) applied. Ultimately, Dr. Peterson had to admit that "we tolerate that as a criticism that perhaps our forecasts are a bit too high for that."[581]

Dr. Rabinovitz had no cogent response on this issue.[582]

Finally, Drs. Rabinovitz and Peterson erred by assuming that all the pending claims would have been resolved soon after the petition, contrary to Garlock's history in the tort system they claim to be trying to model.[583] Dr. Rabinovitz assumed all pending claims would have been resolved in 2010, while Dr. Peterson assumed they would all have been resolved in 2011—both highly unrealistic assumptions, if Garlock had remained in the tort system (as Drs. Rabinovitz and Peterson both assume).[584] These timing assumptions inflated their projections because the payments occur too early and are not discounted as much as they should be.[585]

Dr. Rabinovitz and Dr. Peterson had no response to this criticism beyond calling it a "trivial" issue, without further addressing it.[586]

The total impact of these errors was $120 million in the forecasts of both Drs. Rabinovitz and Peterson.[587]

6. Drs. Rabinovitz and Peterson applied inconsistent inflation and discount rates

Drs. Rabinovitz and Peterson also applied inconsistent inflation and discount rates, as set forth in the report and deposition of Debtors' financial expert Dr. Karl Snow.[588]

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[581] Tr. 3954:11-16 (Peterson).
[582] Tr. 4206:12-4207:12 (Rabinovitz).
[583] Tr. 4782:9-4784:19 (Bates).
[584] *Id.*
[585] *Id.*
[586] Tr. 3952:18-3953:10 (Peterson); Tr. 4204:25-4206:5 (Rabinovitz).
[587] Bates Rebuttal Demonstrative Slides at 5 (GST-8026).
[588] Dr. Snow is a partner at Bates White who received his PhD and MA in economics from the University of Chicago and has extensive experience as a financial expert in academia, the private sector, and litigation engagements. Amended Rebuttal Report of Karl N. Snow, PhD ("Snow Report") (GST-7239) at 2. Dr. Snow did not testify at trial, but his report and deposition were admitted into evidence pursuant to stipulation and order.

Inflation is the general rate of increase in the price of goods and services, while the nominal risk-free interest rate is the interest one can earn by investing in risk free Treasury instruments.[589] The real risk free rate is approximately equal to the inflation rate subtracted from the nominal risk-free rate, and represents the rate of return on risk-free assets after adjusting for inflation.[590] In discounting to present value, the real rate is ultimately what matters, because discounting at the real rate is the same as inflating and then discounting using a nominal discount rate.[591] Because the inflation rate and the nominal interest rate are related, they need to be properly matched in order to ensure a proper estimate of the real interest rate.[592]

Drs. Rabinovitz and Peterson erred because they used short term nominal discount rates but long term inflation rates, resulting in a mismatch and a real discount rate that was too low and a present value for their forecasts that was too high.[593] Dr. Rabinovitz obtained her inflation and nominal discount rates from the FCR's financial expert, Mr. Radecki. Mr. Radecki obtained his inflation rates from a CBO Long-Term Budget Outlook report.[594] But he obtained his nominal discount rate from the market for Treasury securities as of June 2010, which provides short-term interest rates.[595]

Dr. Peterson derived his own long-term inflation rate using the same CPI data used by the CBO report Mr. Radecki relied upon.[596] The financial expert for the Committee, Mr. McGraw, verified Dr. Peterson's inflation rate.[597] Mr. McGraw then selected a short-term interest rate,

[589] Snow Report at 23.
[590] Snow Report at 23-24; McGraw Dep. at 46:18-48:9.
[591] Snow Report at 24.
[592] Snow Report at 22; Tr. 1368:21-24 (Radecki).
[593] Snow Report at 22-23.
[594] Snow Report at 26; 1370:3-8 (Radecki).
[595] *Id.*
[596] Snow Report at 25.
[597] McGraw Dep. at 48:11-49:14.

derived from the market for Treasury securities as of June 2010, which Dr. Peterson then used for his nominal discount rate.[598]

These choices resulted in extraordinarily low real discount rates of 0.75% for Dr. Peterson and 1.0% for Dr. Rabinovitz.[599] The real discount rate Dr. Peterson used was actually negative two percent in 2011, and negative all the way until 2016—meaning claims from those years are actually *more* valuable than earlier claims in Dr. Peterson's forecast.[600] These real rates are facially lower than they ought to be, unless one believes that the U.S. economy will grow at a rate of one percent or less over the term of the forecast (and in the case of Dr. Peterson, a negative rate until 2016), since the real risk free interest rate is equivalent to expected growth after accounting for inflation.[601]

And in fact, the mismatch between the long-term inflation rates and short-term interest rates used by Drs. Peterson and Rabinovitz is evident from the very sources upon which they and their financial experts relied. The discount rates that are appropriate for the long term, CPI inflation rate that both Dr. Peterson and Dr. Rabinovitz used are found in the same CBO report where Mr. Radecki obtained his inflation rate. That CBO report uses long-term nominal interest rates of between 4.9 and 5.9 percent, and thus uses a real risk-free discount rate of between 2.6 and 3.6 percent—many times greater than the real risk-free rates used by Drs. Rabinovitz and Peterson.[602]

On the other hand, the inflation rates that match the short-term interest rates used by Drs. Rabinovitz and Peterson—that is, the inflation expected in the market for the Treasury securities

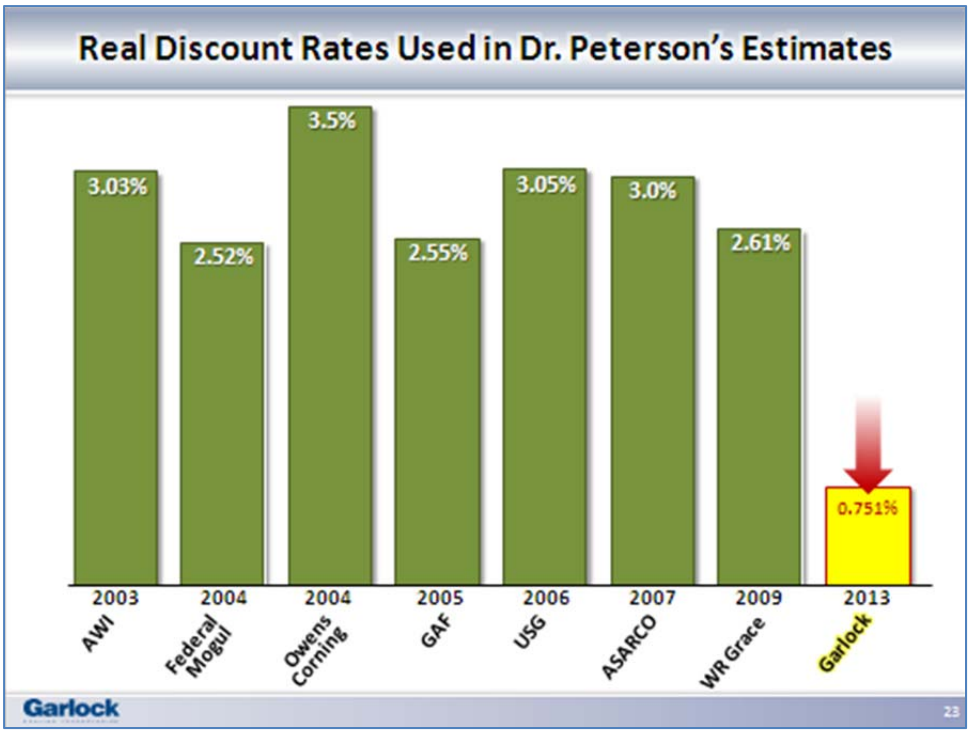
[598] McGraw Dep. at 51:20-52:9.
[599] Snow Report at 26-27, 53-54.
[600] McGraw Dep. at 55:24-56:15, 57:18-58:7.
[601] Snow Report at 22.
[602] Tr. 1370:16-1371:2 (Radecki); Snow Report at 26-27.

they used—are provided in a publication by the Federal Reserve Bank of Cleveland.[603] The Cleveland Fed reports inflation rates embedded in those nominal Treasury yields that are generally lower than the inflation rates used by Drs. Rabinovitz and Peterson and their financial experts.[604] Mr. McGraw admitted he had no opinion on how he would have gone about determining the inflation rate expected in the market for Treasury securities as of June 4, 2010, testifying that "[i]t would be an economic study, academic study of some sort, and I don't do that."[605] Mr. Radecki admitted he did not use the Cleveland Fed report to determine inflation expectations in the market for Treasury securities that he used for his interest rates.[606]

The mismatch between inflation and discount rates in this case is even more curious because Drs. Rabinovitz and Peterson have not committed this error in their past work. Dr. Rabinovitz has generally drawn both her inflation rate and her nominal risk-free interest rate from CBO reports—which, if she had followed the same method here, would have yielded a risk-free real discount rate of approximately 3% instead of approximately 1%.[607] Similarly, Dr. Peterson has typically matched long-term inflation rates with long-term risk-free nominal interest rates, also resulting in real discount rates of approximately 3%.[608] Their change of course in this case resulted in real discount rates that are much lower than real discount rates they used in

[603] Snow Report at 28.
[604] Snow Report at 29.
[605] McGraw Dep. at 59:3-60:17.
[606] Tr. 1373:16-1374:1 (Radecki).
[607] Rabinovitz Report, Owens Corning (Oct. 15, 2004) at 15 n.16 (GST-6591); *see also* Rabinovitz Report, Fibreboard (October 15, 2004) at 16 n. 16 (GST-6591); Rabinovitz Report, NARCO (April 24, 2006) at 12 (GST-6590) (real discount rate 3%); Rabinovitz Report, ASARCO (February 28, 2007) at 13 (GST-6585) (real discount rate 3%); Tr. 1374:2-1375:6 (Radecki); Snow Report at 27; Tr. 4787:7-13 (Bates).
[608] Mark. A. Peterson, Armstrong World Industries, Inc. Projected Liabilities for Asbestos Personal Injury Claims (Nov. 6, 2003) at 23 (GST-6581); Mark A. Peterson, Turner and Newall Inc. Projected Liabilities for Asbestos Personal Injury Claims (Nov. 29, 2004) at 39 (GST-6580); Mark A. Peterson, Owens Corning and Fibreboard Projected Liabilities for Asbestos Personal Injury Claims (Oct. 15, 2004) at 28, 45 (GST-6579); Mark A. Peterson, GAF Projected Liabilities for Asbestos Personal Injury Claims (March 10, 2005) at 44 (GST-6577); Mark A. Peterson, USG Corporation Projected Liabilities for Asbestos Personal Injury Claims (May 2006) at 43-44 (GST-6575); Mark A. Peterson, ASARCO Projected Liabilities for Asbestos Personal Injury Claims (May 2007) at 46-47 (GST-6571); W.R. Grace Projected Liabilities for Asbestos Personal Injury Claims (January 2009) at 87-88 (GST-6574); Snow Report at 27; Tr. 4787:7-13 (Bates).

previous work, even in a forecast in 2009 after the financial crisis produced a generally lower interest rate environment.[609]



When Dr. Bates corrected the mismatch by applying the inflation and risk-free rates found in the CBO report upon which Mr. Radecki relied, Dr. Rabinovitz's forecast decreased by $140 million and Dr. Peterson's forecast decreased by $150 million. *Cf.* 1347:19-23 (Radecki) ("I think the CBO's rates are generally well-respected and reliable. It's a source that's considered objective and nonpartisan.").

Finally, all of this assumes that it was appropriate for Drs. Rabinovitz and Peterson to use real risk-free discount rates. As set forth in Dr. Snow's report, that is not correct. Because Drs. Rabinovitz and Peterson were attempting to predict Garlock's settlements in the tort system—not judgments or allowed claims—their discount rates should have been calculated as if Garlock were in the tort system, including an increase to account for the uncertainty inherent in their

[609] Peterson Cross-Examination Demonstrative Slides at 23 (GST-8014).

forecasts of such future settlements.[610] Alternatively, if Drs. Rabinovitz and Peterson are offering their estimates as a measure of what would be required to fund a Trust to pay future claims, the appropriate discount rate would be the rate of return on Trust assets, which is also higher than the risk-free rate.[611]

Pursuant to the Stipulation and Order Regarding Testimony of Certain Financial Experts, dated September 17, 2013 (Docket No. 3125), expert reports regarding proper inflation and discounted rates and depositions of the parties respective financial experts on these issues have been admitted into evidence. These points are described further in such expert reports and depositions, as well as the witness summaries for the financial experts included in the Appendix. They make Dr. Bates's correction of the mismatch in Drs. Rabinovitz and Peterson's risk-free rates even more reasonable and necessary.

7. Drs. Rabinovitz and Peterson did not demonstrate that their errors are offset by errors in their incidence models

Both Dr. Peterson and Dr. Rabinovitz appeared to excuse errors that Drs. Bates and Gallardo-Garcia had pointed out by claiming that their incidence models likely undercounted the total incidence of mesothelioma, suggesting to the Court that any errors were compensated by this factor.[612]

Neither, however, provided any quantification of this supposed compensating error, such that the Court has no basis upon which to conclude that it offsets the errors that Dr. Bates and Dr. Gallardo-Garcia quantified.

[610] Snow Report at 13, 16.
[611] Snow Report at 32-39.
[612] Tr. 3954:10-20 (Peterson); Tr. 4176:19-4177:17, 4188:6-14 (Rabinovitz).

8. Drs. Rabinovitz and Peterson's forecasts are approximately $300 million when corrected for these errors and the impact of Trusts

When Drs. Rabinovitz and Peterson's forecasts for tort system expenditures are corrected for the basic errors noted above, they predict total tort system expenditures on pending and future mesothelioma claims of just over $600 million.[613] This matches the top end of Dr. Bates's pre-petition expenditure projection range (when present valued, extended to fifty years, and excluding non-mesothelioma claims).[614] That represents a world where Trust claim disclosures remain at their lowest ebb, equivalent to where they were in the mid-2000s.[615]

These forecasts still have to be adjusted for the impact of Trusts established by Dr. Bates using scientific methods, as discussed above. Dr. Bates estimated that, if Trust claims were filed on a contemporaneous basis with tort claims against Garlock, the resulting lower discovery costs and trial risk would yield a total estimate for tort system expenditures on pending and future mesothelioma claims of between $300 million and $320 million.[616] This is equivalent to the lower end of Dr. Bates's pre-petition financial reporting range, when it is extended to fifty years, discounted to present value, and revised to exclude non-mesothelioma claims.[617]

These corrections do not take into account the fact that Garlock's settlements were driven predominantly by avoidable costs of defense. *See supra* Parts I and II. Thus, even the corrected number includes a significant element of cost avoidance, and does not represent Garlock's liability for claims under the law.

[613] Tr. 4787:18-4789:3 (Bates).
[614] *Id.*
[615] *Id.*
[616] Tr. 4801:7-4802:9 (Bates).
[617] Dr. Rabinovitz erroneously testified that Dr. Bates's correction of her estimate is "a lot less" than his pre-petition estimate. Tr. 4199:19-21 (Rabinovitz).

Conclusion

For the foregoing reasons, the Court should enter an estimate of Garlock's current and future mesothelioma claims not exceeding $125 million.

This 1st day of November, 2013.

Respectfully submitted,

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